NOS. 369 TO 379, INCLUSIVE.

FILE COPY.

# Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court,
FILED,
NOV 24 190
JAMES H. McKEN

James G. Tinsley, Appellant,
vs. No. 369.
Morgan Treat, United States Marshal, et al.

Wm. DeC. Kessler, Appellant,
vs. No. 370.
Morgan Treat, United States Marshal, et al.

Samuel T. Morgan, Appellant,
vs. No. 371.
Morgan Treat, United States Marshal, et al.

Austin B. Carpenter, Appellant.
vs. No. 372.
Morgan Treat, United States Marshal, et al.

Fortesque Whittle, Appellant,
vs. No. 373.
Morgan Treat, United States Marshal, et al.

Frank E. Wilcox, Appellant,
vs. No. 374.
Morgan Treat, United States Marshal, et al.

George Braden, Appellant,
vs. No. 375.
Morgan Treat, United States Marshal, et al.

Frank S. Royster, Appellant,
vs. No. 376.
Morgan Treat, United States Marshal, et al.

J. Rice Smith, Appellant,
vs. No. 377.
Morgan Treat, United States Marshal, et al.

Charles F. Burroughs, Appellant,
vs. No. 378.
Morgan Treat, United States Marshal, et al.

Charles H. McDowell, Appellant,
vs. No. 379.
Morgan Treat, United States Marshal, et al.

BRIEF FOR APPELLANTS.

JOHN S. MILLER,
HENRY A. M. SMITH,
JAMES C. BRADFORD,
JOHN J. VERTREES,
ATTORNEYS FOR APPELLANTS.

# INDEX


Act, Overt. See Overt act.
Addyston Pipe Co. Case ..... 98
Amendment to Constitution 6th ..... 31, 131
Attorney-Generals' Reports 1904, 1905 ..... 25, 28
Assignment of Errors ..... 5
Appendix ..... 131
Beavers vs. Henkel ..... 21
Benson vs. Henkel ..... 22
Benedict, J. construction, Sec. 5440, R. S. ..... 71
Brisac's Case ..... 38, 5
Cases, List of, in which merits gone into ..... 18
Constitution, Article 3, Sec 2 ..... 131
Amendment VI ..... 131
Contracts in restraint of trade not criminal at common law ..... 98
Combinations in restraint of trade not criminal at common law ..... 97, 98
Contracts, combinations, and conspiracy, distinction between ..... 96, 97, 100
Conspiracy, overt act no part of ..... 67, 68
and Combination, 3d and 6th counts distinguish ..... 117
definition of under Federal Law ..... 103
" " at common law ..... 103, 105
act of ..... 69, 73
Tennessee definition of ..... 66
could have been defined differently but was not ..... 112
not "continuous" crime ..... 64, 78
to combine—no such offence ..... 118, 121

Conspiracy, merely a means under Sherman Act .... 106
general statute of, Sec. 5440, R. S..... 133
Continuance or renewal—difference..... 115
Culberson of Texas ..... 88
Dealey's Case ..... 72
Debs' Case..... 92
"Engage in," meaning of.....82, 83, 117
Evidence, right to have District Judge weigh..... 14
prima facie rebuttable..... 30
5440, Sec. R. S. ..... 133
Gillespie's Case ..... 41, 60
Government's contention as to "overt act" ..... 77
Goff, J. opinion..... 9
Greene vs. Henkel..... 20
Hoar, Senator, as to Sherman Act..... 87
Holmes, Justice, analysis of Act..... 94
Horner vs. U. S..... 18
Hyde vs. Shine ..... 23, 63
Intent, unexecuted..... 68
Inconvenience, argument of ..... 36
Indictment, must aver wicked means..... 56
copy not "evidence"..... 34
means averred in this one..... 108
Jurisdiction on Appeal ..... 122
Kentucky Case as to conspiracy at common law..... 89
Locus penitentiæ ..... 71, 72
Mathers' Case..... 61
Noyes' Case ..... 42
Offences, no common law, against U. S..... 103
Order of removal judicial act..... 22
reasons why judicial act..... 16
Overt act—
No part of crime..... 67, 68
May be done anywhere..... 73
Not renewal or continuance of conspiracy 74, 78
Crimes ad infinitum..... 64, 78
Acts which are innocent alleged as.. 45–9, 51, 54

Overt act—Continued.
Known only in conspiracy law..... ..
Must be wicked act..... 56–58, 61
No place under Sherman Act..... 107, 110
Patterson's Case..... 90
"Personal Presence" not involved in case..... 37
Probable Cause, why proof of required..... 15, 16, 33
Questions which are not involved stated..... 12, 13
Removal Statute, Sec. 1014 R. S..... 131
Reasons for enacting..... 16
Restraint of trade, what it is..... 110, 111
Resume..... 128
Root, Elihu, argument of in Patterson Case..... 89
Sherman Act..... 85
History of..... 86
Analysis of..... 88, 96
Leveled at agreements, not acts pursuant thereto..... ..
Supersedes and amends, Sec. 5440 as to what 115, 119
Statement of facts..... 1–5
Tennessee Act..... 66
Virginia, laws of as to arrest..... 10
Venue, whether overt act gives, open one here..... ..
Wilson, of West Virginia..... 88
Woods, J., Op. in Debs' Case..... 93

# Supreme Court of the United States,

OCTOBER TERM, 1906.

James G. Tinsley, Appellant,
vs. No. 369.
Morgan Treat, United States Marshal, et al.

Wm. DeC. Kessler, Appellant,
vs. No. 370.
Morgan Treat, United States Marshal, et al.

Samuel T. Morgan, Appellant,
vs. No. 371.
Morgan Treat, United States Marshal, et al.

Austin B. Carpenter, Appellant,
vs. No. 372.
Morgan Treat, United States Marshal, et al.

Fortesque Whittle, Appellant,
vs. No. 373.
Morgan Treat, United States Marshal, et al.

Frank E. Wilcox, Appellant,
vs. No. 374.
Morgan Treat, United States Marshal, et al.

George Braden, Appellant,
vs. No. 375.
Morgan Treat, United States Marshal, et al.

Frank S. Royster, Appellant,
vs. No. 376.
Morgan Treat, United States Marshal, et al.

J. Rice Smith, Appellant,
vs. No. 377.
Morgan Treat, United States Marshal, et al.

**Charles F. Burroughs, Appellant,**
**vs. No. 378.**
**Morgan Treat, United States Marshal, et al.**

---

**Charles H. McDowell, Appellant,**
**vs. No. 379.**
**Morgan Treat, United States Marshal, et al.**

---

*May it please the Court*:

These are appeals in *habeas-corpus* proceedings, instituted to prevent the removal of appellants from the State of Virginia, to the State of Tennessee, for trial upon an indictment which had been returned against them and others, in the Circuit Court of the United States for the Middle District of Tennessee.

There are eleven cases. They are similar, and for that reason are heard as one.

They involve the question of the right of the "offender", the person arrested in removal proceedings, to adduce *evidence* to show that the Court of the district to which he is sought to be removed, has *no jurisdiction* over the alleged offense; to show the absence of probable cause.

## STATEMENT.

On the 26th day of May, 1906, an indictment was returned by the grand-jury into the Circuit Court of the United States for the Middle District of Tennessee against thirty corporations, two partnerships, and twenty-five persons, as defendants.

This indictment contains six counts. In substance it avers that the defendants were and are engaged in the fertilizer

business in the United States, and, all together, control ninety per cent. of the business, and that they do an inter-state commerce business.

It charges that they constitute what is popularly known as the "Fertilizer Trust" and that they sought to control the price of fertilizers in eight of the Southern States.

Four counts (the first, second, fourth, and fifth) charge the defendants with the offense of violating Section 1 of the anti-trust act, commonly known as the "Sherman Act."

Two counts (the third and sixth) charge them with violating the general conspiracy law, or Section 5440 of the Revised Statutes of the United States.

This general statement of the nature of the indictment is sufficient for the present, but it will be particularly described later in another connection.

The appellants are officers and agents of the accused corporations, and none of them are citizens of Tennessee. Upon complaint made by Morgan Treat, U. S. Marshal (the appellee) apellants were arrested at Richmond in the Eastern District of Virginia, and taken directly before the District Judge; that is, they were not first taken before a Commissoner, and committed by him, and an application then made to the Judge of the District for an order for their removal to Tennessee. Consequently, Judge Waddill, the District Judge, acted in a dual capacity—as committing Magistrate, and also as ordering Judge.

In these proceedings before the District Judge, the appellants (the "offenders" of the statute) admitted that they were the persons named in the indictment. The Government offered as evidence, a certified copy of the *indictment, and nothing more;* and thereupon asked for an order to be made for the commitment and removal forthwith of the prisoners.

(Rec., p. 120.) As the cases are similar, it will be sufficient to state that which happened in one—Mr. Tinsley's case.

When the Government asked for the order of removal Mr. Tinsley offered himself as a witness, and asked to be sworn. Counsel for the Government objected, upon the ground that the indictment was *conclusive*—that "no evidence is admissible here to impeach it." (Rec., p. 7.) Mr. Tinsley's counsel then stated what he (Tinsley) would prove by himself as a witness, and by other witnesses then and there present—which was, in substance, that Mr. Tinsley had never been guilty of *any* of the acts or things charged, in Tennessee, or elsewhere. (Rec., pp. 7, 8, 10.) The objection of the Government was renewed.

The District Judge refused to permit the witnesses to be sworn, or to hear their evidence; and he made an order for the appellant's commitment and removal. He held that *under the laws of Virginia,* there was no right to a preliminary examination prior to the trial upon the merits, and consequently that there was none under the laws of the United *States;* and that it was his *duty* to order the removal. (Rec., p. 8.)

Mr. Tinsley then presented his petition to the Circuit Court (held by Judge Goff) for writs of *habeas-corpus* and *certiorari.* Both writs were granted and, *issued,* and returns duly made. (Rec., pp. 63, 64, 65.)

The petition exhibited a copy of the record of the proceedings before the District Judge, and also *stated the evidence* which the appellant offered and asked permission to give. (Rec., pp. 7, 8.)

It averred that Mr. Tinsley, the appellant, never did, or committed, or engaged in, any of the offenses, acts, things, or transactions charged, *in the Middle District of Tennessee,*—

not even in the making of the indorsement of a certain check, which was set forth in the indictment as an "overt act" on his part. (Rec., pp. 10, 28.)

The same proceedings were had in the Circuit Court upon the petition as those that took place before the District Judge—that is, the Government offered the copy of the indictment, and then rested; Mr. Tinsley offered himself; and his counsel stated, when objection was made, what he and witnesses then present, would testify; the Court refused to hear the evidence, ordered the removal; and Mr. Tinsley excepted, assigned errors, and appealed. (Rec., pp. 126, 131.)

## ASSIGNMENT OF ERRORS.

The Court below erred in these respects, namely:

1. In discharging the petitioner's writs of *habeas-corpus* and *certiorari* and remanding him to the custody of the United States Marshal.
2. In refusing to grant the prayer of said writs.
3. In refusing to discharge said petitioner.
4. In holding that the restraint of the petitioner's liberty is legal.
5. In holding that the restraint of your petitioner is not in violation of his substantial rights.
6. In holding that said alleged indictment or any count thereof stated an offense against the laws of the United States.
7. In holding that the alleged indictment, or any count thereof was sufficient upon which to base a warrant of removal.

8. In holding that there was sufficient evidence of probable cause.

9. In holding that the warrant of removal made by the United States District Judge for the Eastern District of Virginia was issued upon the finding of probable cause; and and in not holding that said order and warrant of removal were unauthorized and void because said District Judge refused to receive or hear any evidence offered by petitioner.

10. In holding that the alleged indictment with proof of identity was conclusive evidence of probable cause.

11. In holding that upon the introduction in evidence of the alleged indictment with proof of identity that the defendant, your petitioner, was not entitled to introduce evidence offered by him and in refusing to hear or receive evidence offered by him to show that the alleged offense, charged in said indictment and in each count thereof had not been committed by him in the State of Tennessee, in which State the indictment was found and in so holding, violating Article V and Article VI of the Amendments to the Constitution of the United States in that he was deprived of his liberty without due process of law.

12. In failing to hold that your petitioner is deprived of his liberty without due process of law in violation of Article V of the said Amendments to the Constitution of the United States, in that said District Judge refused to hear or receive any evidence offered by your petitioner in that the complaint and evidence referred to herein, which were the sole authority for the petitioner's arrest and commitment as aforesaid failed to charge the petitioner with any crime against the laws of the United States.

13. In failing to hold that the petitioner's detention was in violation of Article V of the Amendments to the Constitu-

tion of the United States in that the said United States District Judge, sitting as United States Commissioner and the United States District Judge has such jurisdiction to order the arrest and commitment of your petitioner, and that your petitioner is held to answer for a crime without any sufficient or valid indictment of a grand jury.

14. In failing to hold that restraint of your petitioner is in violation of Article IV of the Amendments to the Constitution of the United States, because it appears from the indictment upon which the warrant in this case was issued that it was wholly void.

15. In failing to hold that restraint of your petitioner is in violation of the provisions of Article IV of the Amendments to the Constitution of the United States for the reasons particularly specified in his petition for a writ of *habeas-corpus.*

16. In holding that a warrant of removal should issue for the reason that the proceedings conclusively show, by the indictment that the venue for the facts alleged in the indictment is not and was not in the Middle District of the State of Tennessee or in the State of Tennessee.

17. In failing to hold that the restraint of your petitioner is in violation of the provisions of Article VI of the Amendments to the Constitution of the United States, for the reason that upon the proof offered to be made and rejected by the United States District Judge, sitting as a Commissioner, and the United States District Judge and this Honorable Court, sitting upon the hearing of the petition of *habeas-corpus,* and by the averments of said petition which were not controverted, it was conclusively shown that the offenses charged in the indictment were not committed in the Middle District of the State of Tennessee or in the State of Ten-

nessee, and that he could not be lawfully tried by a jury of the State of Tennessee and of the Middle District of Tennessee where said indictment was found.

18. In holding that the warrant of removal was properly issued, as the record and proceedings conclusively show that the alleged offense, complained of in the indictment and the several counts thereof, did not occur within the Middle District of the State of Tennessee, or in the State of Tennessee, and that your petitioner did not conspire to commit any offense within the State of Tennessee, or in the Middle District thereof.

19. In holding that your petitioner was lawfully in the custody of said Morgan Treat, United States Marshal in and for the Eastern District of Virginia, and was lawfully deprived of his liberty by him by due process of law." (Rec., pp. 132, 133.)

## ARGUMENT.

Both the Circuit and the District Judges have stated the grounds of their decisions.

The District Judge was of opinion that *under the laws of Virginia* there is no right of preliminary examination prior to the trial upon the merits, and that inasmuch as he was sitting in *Virginia,* it was his *duty* to order a removal, without hearing evidence to contradict the indictment. (Rec., p. 121.)

The Circuit Judge said that the District Judge had acted "in conformity with like proceedings as provided for in criminal actions in the State of Virginia." He was of the opinion that the indictment was good, and that it alleges a conspiracy such as is prohibited by the laws of the United States, and also states that an overt act was done in the Mid-

dle District of Tennessee. But the ground upon which his decision is placed, is, that while probable cause must be shown in order to obtain a removal, a copy of the *indictment* shows it; and that inasmuch as the copy of the indictment alone, was sufficient in *Beavers vs. Henkel* (194 U. S., 73) it is sufficient here. He said.

> "While it is true that the order to remove for trial should only be issued in cases where probable cause has been shown, it is equally true that a certified copy of the *indictment,* with proof of the identity of the party accused, has been in a number of well considered cases, held to establish probable cause, and to authorize the warrant. of removal. It must be conceded that the authorities are conflicting; but to my mind the path that we should follow has been plainly indicated by the opinions of that great tribunal, whose mandates we all obey, whose judgments are the supreme law of the land. In *Beavers vs. Henkel* (194 U. S., 73) the case *rested* on the efficacy of the indictment; *for no other evidence of guilt was offered.* The indictment was held to be *prima facie* evidence of the existence of probable cause. It satisfied the requirements of the Constitution, and the laws made thereunder. Why should not the indictment in the case we now have under consideration serve the same purpose? The testimony tendered is, as I understand this case, immaterial, and the identity of the accused is admitted. His guilt or innocence is not to be ascertained by testimony offered in this jurisdiction, in connection with questions involved in the proceedings relating to the warrant of removal, or this writ of *habeas-corpus.* That matter must go to the jury empanelled by the Court in which the indictment was returned."
>
> Rec., p. 125.

It will be hereinafter shown, as we believe, that neither of these reasons is sufficient. At the same time it is conceded that insufficient reasons may sometimes be given to support conclusions which are sound. For that reason, both the reasons and the conclusions will be discussed in this brief.

*And first, as to the laws of Virginia*:

In the State of Virginia where an indictment has been found and a *capias* issues for the arrest of the defendant, there is no inquiry to be made. (Code, § 4003.)

But where no indictment has been found, and a person is arrested for an indictable offense, he must be taken before a magistrate for preliminary examination, and it is the duty of that magistrate to *inquire* whether or not there is sufficient cause for charging him with the offense. (Pollard's Code of Virginia's Anno. Vol. 2, §§ 3955, 3058, 3969.)

We think it may be safely stated that there is no State in which a different rule has ever prevailed, and that this was the law in the various States at the time the Federal Statute was enacted. If so, it is obvious that the proceedings referred to in the statute, are such as prevail in cases where magistrates are making preliminary examinations to ascertain whether or not there exists probable cause.

The Federal Statute however makes a provision not made by the statutes of any State. Inasmuch as statutes are to be interpreted in the light of all that *can* be done under them, (194 U. S., 83) and not in the light of what a just, broad-minded, prosecuting attorney *probably would* do under them, that part of the Federal Statute which requires the direction of the Judge of the district, has been construed (as hereinafter shown) to call for *judicial,* rather than ministerial action.

A Justice of the Peace, or Commissioner of Virginia has the power, upon a preliminary hearing, to bind the offender to appear before the proper Court in the county where the offense was committed, or cause him to be delivered to the Sheriff to be taken there.

But a Commissioner or Justice sitting under Section 1014 of the Federal Statutes, has *no power* to order a removal. "His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint upon which he acts, or the indictment offered in support thereof, contains the necessary elements of the offense, it is sufficient, although a more critical examination may show that the statute does not completely cover the case." (*Benson vs. Henkel,* 198 U. S., 11.) He may hold, or commit the offender, but *he cannot order a removal.* Another affirming judgment is required. The *Judge* of the district only can make an order like that. Consequently that part of Section 1014 which says the proceedings are to be conducted "agreeably to the usual mode of process against offenders in such State" relates alone to the *procedure* before the *Commissioner.* It has no relation to the proceedings before the Circuit Court upon *habeas-corpus.* (*Hyde vs. Shine,* 199 U. S., 85). And for that same reason it can have no relation to the hearing before the Judge of the district. A *Federal* Statute makes it *his duty,* to order the removal, and the "offender's" *right* to have *him* to do it; and that universal Federal Statute cannot be neutralized by the *condition* of the criminal laws of a particular State. The fact that Virginia denies to offenders brought before her Commissioners, the right to have an inquiry into the existence of probable cause, [if it were a fact] is no reason why an offender against Federal law, shall be denied the right which a *Federal Statute*

gives him, because the Federal Judge chances to sit in Virginia.

Nor is the reason upon which the Circuit Judge's action is based sufficient. The fact that the copy of the indictment was held to be sufficient in *Beavers vs. Henkel* (194 U. S., 73) is no ground for holding a copy sufficient here, for the reason that *the cases are unlike.* In that case the "offender" did *not* offer evidence to contradict the indictment, or to show the absence of probable cause. He sought to penetrate the grand-jury room, to give evidence of what happened there; and this Court refused to permit that to be done. It was held that *such* evidence was incompetent, and that the offender would not be permitted by such methods to ascertain the Government's case, and "prepare the way" for his defense. The evidence was rejected because it related to the *proceedings* before the grand-jury, not because it went to the merits and tended to show the absence of probable cause.

In the cases now under consideration, the appellants offered no evidence as to the proceedings before the grand-jury. They offered evidence going to the merits—evidence which would prove that they were innocent of the crime charged and that the Court in Tennessee had *no jurisdiction* to try them therefor; that the alleged offenses were not committed there. This important distinction appears to have escaped the sagacity of the learned Circuit Judge.

In this connection it should be observed that no attempt was made to present evidence which would penetrate the grand-jury room, and reveal its secrets and vitiate its proceedings.

It is also to be remarked that there is no question here as to the power of the Circuit Court to grant or refuse, at pleasure, the writ of *certiorari.* The writ was granted.

Neither is there here any question of *conflicting* evidence. No evidence is to be weighed, because the appellants were not permitted to adduce their evidence.

As will be observed, these cases squarely present the question of the *conclusiveness* to be attached to an indictment as "evidence," in removal cases. Stated in the form of a proposition, it is this:

In *habeas-corpus* removal proceedings, instituted to prevent the removal of an "offender" from the district of his residence in one State, to a district in another State for trial under an indictment found in the latter State, a certified copy of the indictment is not *conclusive,* and it is open to the "offender" to show the absence of probable cause, and that the Court has no jurisdiction.

Even if the Government had not "rested" after presenting a copy of the indictment, but had also presented witnesses whose evidence tended to show that the appellants had committed the crime of conspiracy against trade, it is obvious that appellants might (if allowed to do so) have met it with evidence that overwhelmingly contradicted that of the Government; or, without assailing it at all explained it entirely away; or, with evidence that the crime was not committed in Tennessee, and therefore the Court was without jurisdiction. It is equally clear that evidence which *explained* the Government's evidence, or which showed the Court to be without jurisdiction, would not require the District Judge either to *weigh* conflicting evidence, or to *try* the case. This, we concede, could not be said in a case where the offender's evidence *contradicts* that which the Government has offered. Yet in that case it might be equally as convincing to the District Judge. For example: Suppose the Government to present a witness who testifies positively and unequivocally

that he saw the accused commit the offense for which he stands indicted. This makes out not only a *prima facie,* but a clear, case of guilt. But assume further that witnesses of high character, are presented who prove that on the very day it is alleged the prisoner committed the offense he was with them in London. In this case the District Judge would have to *weigh* the evidence, and in our view it is the *right* of the "offender" to have him do it. Nevertheless if he did do it, and found for the Government, this Court perhaps would not reverse on *habeas-corpus* however much it might be convinced that he was away, and innocent. Even though the finding and determination of the District Judge, as to the *existence* of probable cause, may be final and conclusive, it is the right of the accused to have it; for it may, and in the case supposed ought to, be in his favor. No such question is presented here. The Government presented no evidence. It was content to rest upon the copy of the indictment alone; to rely upon something that is really not evidence at all. And the appellants were not allowed to present anything in the way of evidence. They were not even allowed to be sworn. They did not seek to contradict any of the Government's evidence, for it introduced none to be contradicted. The Government did present a copy of an indictment charging that appellants committed the crime of conspiracy in Tennessee. They did ask to be permitted to show by evidence that they had done no such thing, and therefore that the Court had no jurisdiction to indict and try them. Appellants asked to be permitted to do this, because this Court has said that if the evidence given fails to show any offense, or if it appear that the offense was not committed or triable, *in the district to which the removal is sought,* there is *no jurisdiction* either to

commit the accused or to order his removal. (*Greene vs. Henkel,* 143 U. S., 249, 261.)

It is not necessary to consider the assignment of errors in detail, inasmuch as they all rest upon the same propositions.

## PROPOSITION I.

*In habeas-corpus removal proceedings instituted to prevent the removal of an "offender" under Section* 1014 *of the Revised Statutes, from his residence in one State, to a district in another State, for trial under an indictment found in the latter State, when a certified copy of the indictment is the only evidence introduced by the Government to show the existence of probable cause, it is the right of the "offender" to present evidence that proves the absence of probable cause; that he is innocent of the offense charged in the indictment, or that the Court has no jurisdiction.*

*This right exists also on the hearing before the Judge of the district upon an application to him for an order of removal.*

The statute (§ 1014 R. S.) provides that when an "offender" is committed in any district other than that where the offense is to be tried, it shall be the duty of the Judge of the district to issue a warrant for his removal. That was enacted many years ago, and long before the era of railways and rapid transit. (U. S. Stats., 1789, Ch. 20; 1793, Ch. 22; 1842, Ch. 188.) The difficulties of the situation, the burden which existing conditions at that time put upon an "offender", and the jealousy with which the right to be tried by a jury of the vicinage had always been regarded, were the reasons which led to the enactment of this statute.

The reason why trial must be had where the crime was

committed is that, as a rule, the right to be tried by a man's neighbors, or those who know something about him will thereby be secured.

An ordinary Commissioner cannot direct the removal of an offender. He may commit or imprison, but there can be no removal until it has been ordered by the *Judge* of the district. That order of removal is a *judicial* act, rather than a ministerial one. (*Beavers vs. Henkel*, 194 U. S., 73). The reason why it was so established has been given in more than one opinion. It is this: In controversies between the Government and an individual the latter is entitled to reasonable protection. The enforcement of the criminal law in such cases must not be oppressive. Removal to a distant State is no light matter, imposing as it does an expense in preparation for defense, generally beyond the ability of the defendant to pay. (*Hyde vs. Shine*, 199 U. S., 62).

"In a country of such vast extent as ours it is no light matter", said Dillon, J., in *Buell's Case* (4 Fed. Cas., No. 2102) "to arrest a supposed offender, and on a mere order of an inferior magistrate remove him hundreds, it may be thousands, of miles for trial".

It is the *constitutional right* of the citizen to be tried in the district in which the offense was committed, and not elsewhere, and therefore the law, says Judge Dillon, "wisely requires the *previous sanction* of the District *Judge* to such removal." (4 Fed. Cas., No. 2102.)

The inferior Federal Judges, with perhaps not more than two exceptions, have construed this statute, and acted under it, according to its full meaning and spirit.

In *Greene's Case* (52 Fed. Rep., 106) Judge Jackson, subsequently a Justice of this Court, said that

"It is well settled that upon application for an order of removal under Section 1014 R. S., the District Court or Judge may properly look into the indictment to ascertain whether an offense against the United States is charged, and whether the Court to which the accused is sought to be removed has jurisdiction of the same. In such cases the Judge exercises something more than a mere ministerial function involving no judicial discretion. *The liberty* of the citizen, and his *general right* to be tried in a tribunal or forum of his domicile, imposes upon the Judge the *duty* of considering and passing upon those questions. Such has been the uniform practice of the Federal Courts."

It was thus expressed by another Judge in an earlier case:

"But I have no doubt the Judge, in his sound discretion, may go into the whole case, if necessary, to enable him to determine whether the party is to be removed from his home to a distant part of the country. This is a law in restraint of liberty, and, like all such laws of this character, while the very substance of the law is not to be construed away, yet, it is to be strictly construed and strictly pursued. The Government asking the removal, is required to fully comply with the law. The question, then, which presents itself to the Judge, is where the case is to be tried, where a trial can be had. Before a trial can be had before any Court of the United States, such Court must have jurisdiction over the place, the person, and the subject matter."

27 Fed. Rep., 609.

The following are cases in which the Judge of the district acted upon this construction and looked into the case,

and heard evidence, and determined whether there existed probable cause:

*In re Doig*, 4 Fed. Rep., 194, 195;
*In re Price*, 83 Fed. Rep., 830;
*United States vs. Pope*, Fed. Cases, No. 16069;
*In re Wood*, 95 Fed. Rep., 288;
*United States vs. Fowkes*, 49 Fed. Rep., 50; 53 Fed. Rep., 13;
*In re Wolf*, 27 Fed. Rep., 606;
*In re Greene*, 52 Fed. Rep., 104;
*United States vs. Greene*, 100 Fed. Rep., 941;
*United States vs. Lee*, 84 Fed. Rep., 626;
*United States vs. Greene*, 108 Fed. Rep., 816;
*In re Dana*, 68 Fed. Rep., 886;
*Ex parte Rickett*, 61 Fed. Rep., 203;
*Price vs. McCarty*, 89 Fed. Rep., 84;
*United States vs. Rodgers*, 23 Fed. Rep., 661;
*United States vs. Brawner*, 7 Fed. Rep., 86;
*In re Buell*, 4 Fed. Cases, No. 2102;
*United States vs. Voltz*, Fed. Cases, No. 16627;
*United States vs. Haskins*, Fed. Cases, No. 15322;
*United States vs. Shepard*, Fed. Cases, No. 16273;
*In re Alexander*, Fed. Cases, No. 162;
*In re Beshears*, 79 Fed. Rep., 70;
*In re Terrill*, 51 Fed. Rep., 213;
*In re Corning*, 51 Fed. Rep., 205.

Various questions involved in removals have been decided by this Court.

HORNER VS. UNITED STATES,
143 U. S., 207 (1892).

Horner was indicted in the District Court of the United States for the Southern District of Illinois for violating Section 3894 of the Revised Statutes relating to lottery circulars. He was arrested in New York on a bench war-

rant, for the purpose of removing him to Illinois for trial. He was taken before a Commissioner, and evidence was heard, and he was committed. Application was thereupon made to the District Judge for a warrant of removal. One objection interposed by Horner was that the offense if committed, was wholly committed in New York, and that the offense charged in the indictment was therefore not legally triable in Illinois. The District Judge inquired into all this, and held that before a District Judge orders a person to be removed in such cases he should "look into" the indictment so far as to be satisfied that the offense charged "is such an offense as may be lawfully tried in the forum to which it is claimed the accused should be removed". (44 Fed. Rep., 677.)

The District Judge, however, found that the offense had been committed in both States. That is, it had been begun in one and was completed in the other, and was therefore a proper case for removal under Section 731 of the Revised Statutes.

Horner thereupon sued out a writ of *habeas-corpus* from the Circuit Court, but it was dismissed upon the hearing, and Horner appealed to this Court. The action of the Circuit Court was affirmed; but it was held that the District Judge, in exercising his jurisdiction under Section 1014 of the Revised Statutes, had a right to determine whether the offense was committed within the jurisdiction of the Federal Court for the Southern District of Illinois; also that his determination of that question *was reviewable* by writ of *habeas-corpus*. (148 U. S., 214.)

It was also held that the decision of the Commissioner as to the identity of Horner was a question of fact which would not be reviewed on *habeas-corpus*.

GREENE vs. HENKEL,
183 U. S., 249 (1902).

Greene was indicted in the District Court of the United States for the Southern District of Georgia. He was arrested and taken before a Commissioner in the State of New York. The Commissioner ruled that the copy of the indictment was conclusive evidence of probable cause and refused to hear any evidence on the part of the defendant; and thereupon application was made to a District Judge in New York for an order for Greene's removal. That Judge held that the Commissioner should have heard evidence; and remanded the case to him for that purpose. The evidence was then fully gone into by the Commissioner, and he decided upon it that there was probable cause. Application was again made to the District Judge for an order of removal. He also held that the evidence showed the existence of probable cause and made the order accordingly. (108 F. R., 116; 100 F. R., 941.)

Greene thereupon presented his petition to the Circuit Court for the writ of *habeas-corpus*. The evidence taken before the Commissioner, and which was also before a District Judge was not annexed to the petition, neither was there any application for the writ of *certiorari* to bring it up. As a consequence the evidence was no part of the record in the *habeas-corpus* case, and therefore was not before either the Circuit Court or the Supreme Court. This Court thereupon expressly *assumed* that the finding of probable cause was sustained by competent evidence. (Page 259.) The only point for decision by this Court, in the case, was whether the New Yourk Judge had jurisdiction. The ground on which his jurisdiction was assailed was that the indictment was so defective as to be void. The point made was that the laws

were not complied with in *drawing* the grand-jury which found the indictment, but this Court held *that* to be a question exclusively for the trial Court. This Court also said, however, that where an indictment charges no offense against the laws of the United States, or the evidence given fails to show any offense, or if it appear "that the offense was not committed or triable in the district to which the removal is sought", there would be *no jurisdiction* either to commit the person, or to order his removal. (183 U. S., p. 261.)

BEAVERS VS. HENKEL,
194 U. S., 73 (1904).

Beavers was indicted in the Circuit Court of the United States for the Eastern District of New York. Upon a warrant duly issued he was arrested in the Southern District of that State. On the trial before the Commissioner the Government offered a copy of the indictment as evidence of probable cause. The only evidence that Beavers offered was evidence relative to the *proceedings* before the grand-jury which found the indictment—evidence tending to show what transpired before the grand-jury. This Court said that such evidence was "not competent" and that a defendant could not in this way ascertain what testimony the Government may have against him, and thus *prepare the way* for his defense.

The Court held that inasmuch as the *only* evidence in the case was the copy of the indictment, it was unnecessary to decide whether a copy of an indictment shall be conclusive proof of the existence of probable cause. That it was sufficient to decide, and the Court therefore did decide, that in such case the indictment was *prima facie* evidence, and in *that* case, therefore, sufficient evidence of probable cause.

In the course of the opinion, which was delivered by Mr. Justice Brewer, it is said:

> "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that *may* be done under them. We must never forget that in all controversies, civil or criminal, between the Government and an individual the *latter* is entitled to *reasonable protection.* Such seems to have been the purpose of Congress in enacting Section 1014, Rev. Stat., which requires that the order of removal be issued by the Judge of the district in which the defendant is arrested. In other words, the removal is made a JUDICIAL, rather than a mere *ministerial,* act."

BENSON vs. HENKEL,
198 U. S., p. 1 (1905).

In this case the Court held that *in general* it is not for the committing Commissioner to inquire into the validity of an indictment; that that is a question to be determined by the Court in which the indictment was found; and for the reason that a Commissioner is "not presumed to be acquainted with the niceties of criminal pleading". At the same time the Court said that while this was the general rule, yet if upon inspection of the indictment, it sets forth no crime against the United States, or a different crime from that alleged as the basis for proceedings, the Commissioner should not consider it as sufficient ground for removal. The dissenting opinion (in which Justices Day, McKenna, Peck-

ham and White concur) holds that the Commissioner must pass upon the sufficiency of the indictment; that while no technical objection should prevail against the indictment, it should be considered, and if it charge no offense, it was the duty of the Commissioner not to order a removal.

Although it is to be conceded that the ordinary Commissioner is not presumed to be skilled in the "niceties of criminal pleading", this cannot be said of the District Judge. The District Judge to whom application is made for a warrant of removal, is as capable of passing upon all questions as the District Judge of the Court in which the indictment was found; and the law not only requires the judgment of the unskilled Commissioner, but *also* that of a District Judge skilled and learned in the law, in order to remove an indicted person from one State to another for trial. The judgment of the District Judge is required. Why? What is the reason? There can be but one reason and it is this: that in view of the hardship and inconvenience of improper removals, the law meant to give the *defendant* the benefit of the judgment of a learned *Judge* as well as that of an unskilled Commissioner.

HYDE VS. SHINE,
199 U. S., 62 (1905).

Hyde was indicted in the Supreme Court of the District of Columbia. He was arrested at his home in California. The Commissioner committed him, and the District Judge made an order for his removal. Horner thereupon applied to the Circuit Court for a writ of *habeas-corpus,* but his application was denied, and he appealed to this Court. The petition for a writ of *habeas-corpus* did not set forth the evidence relied on to show probable cause. The Circuit

Court refused to issue a writ of *certiorari* to bring up the record of the evidence before the Commissioner. The petition did aver that the evidence before the Commissioner showed that petitioner was never in the District of Columbia and could not have committed the offense charged, and the minority of this Court thought its averments were sufficient; but it was held by the majority that the petition was defective in that it did not "set forth" the evidence. The Commissioner did receive evidence in behalf of Hyde upon the hearing before him, and upon such evidence found the existence of probable cause. Consequently there was no question before this Court as to the right of Hyde to introduce evidence as against the certified copy of the indictment; for his evidence was received and considered. The question in the case was, Whether he was entitled to the writ of *certiorari* as a matter of right? The majority held that he was not. That it was entirely discretionary with the Circuit Court to grant or to refuse it; and that as it had been refused, he had no legal ground of complaint, and that he ought to have *set forth* the evidence in his petition if he wanted to get the question of probable cause before the Court. The minority held that he had a *right* to the writ of *certiorari,* and that its issuance was not within the arbitrary discretion of the Circuit Court, and that the averments of the petition were sufficient. In the minority opinion, it is said:

> "The right is none the less, when the want of probable cause rests upon conclusive evidence of the absence of the defendants from the district at the time when the indictment alleges the conspiracy was formed in such district. If defendants were not then there, they could not be guilty of the crime charged in the indictment. The case is an extreme illustration

of the very great hardship involved in sending a man 3,000 miles across the continent, from California or Oregon, to this district for trial, where he is to bring his witnesses, and where on such trial it will appear that the Court must direct an acquittal, because the averment of the formation of the conspiracy at Washington, D. C., is shown to be false to a demonstration.

"The expense to a defendant in his necessary preparation for trial, and in procuring the attendance of witnesses in his behalf from such a distance, must necessarily be enormous, and in many, if not in most cases, utterly beyond the ability of a defendant to pay. The enforcement of the criminal law should *not be made oppressive* in such cases, and, therefore, when it appears there was no probable cause to found the indictment upon, the order of removal should be refused."

Text-writers understand the law to be as appellants insist (Hughes' Crim. Proc., §§ 15-17, p. 29), and so does the Attorney-General of the United States. In his annual report in 1904, he said:

"Much embarrassment in the administration of the law has arisen from the inability of the United States to bring an offender to the place and the Court where by the Constitution and laws the accusation against him must be tried. By the Constitution the trial of all crimes must be held in 'The State and district wherein they shall have been committed.' It frequently happens that persons accused are not found within the limits of the district where the offenses alleged against them are triable. The frequency of such absence increases with the gravity of the accusation, and where it consists in a conspiracy almost invariably one or more of the alleged offenders are without the jurisdiction of the district.

"In the States of the Union it is the usual, if not the invariable practice, that the process of the Superior Courts, for the apprehension of one accused of crime against the State, runs everywhere within the State, even though the territorial jurisdiction of the trial Court may be limited. No constitutional reason is perceived why the criminal process of any of the Courts of the United States should not in like manner run throughout its territorial extent. The law regulating the apprehension of offenders against the laws of the United States is found in Section 1014 of the Revised Statutes, which is as follows:

" 'For any crime or offense against the United States the offender may, by any Justice or Judge of the United States, or by any Commissioner of a Circuit Court to take bail, or by any Chancellor, Judge of a Supreme or Superior Court, Chief or First Judge of Common Pleas, Mayor of a city, Justice of the Peace, or other Magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such Court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the Clerk's office of such Court, together with the recognizance of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried it shall be the duty of the Judge of the district where such offender or witness is imprisoned seasonably to issue, and of the Marshal to execute, a warrant for his removal to the district where the trial is to be had.'

"The usual practice which is followed in such cases, is that when an indictment by a grand-jury is

returned a warrant issue to the Marshal for the arrest of the defendant. If after search that officer is unable to find the defendant within his district the warrant is returned to Court with the endorsement that the defendant is 'not found.' If the defendant is believed to be in another district, the United States Attorney of that district is informed and makes the fact known to the proper official under Section 1014 (usually a United States Commissioner) whereupon a warrant for his arrest is issued. After the presence of the accused is secured, if there is a finding adverse to him by the Commissioner, opportunity for bail is given, and if that is not furnished an order for the removal of the prisoner is sought from the District Judge. It has always been the *contention* of *this* department that the authentication of the indictment and the proof of the identity of the defendant are *conclusive* ground of removal. *This contention has, however, not been supported by the decisions of the Courts,* notably of the districts within the State of New York. An accurate statement of the effect of the decisions in those districts is found in *United States vs. Greene* (100 Fed. Rep., 941, 943), in the following language:

" 'That the proceeding for commitment and removal under Section 1014 is an original proceeding, to be conducted according to the laws of the State in similar proceedings before committing Magistrates; that the object of the proceeding is to enable the Commissioner to ascertain for himself whether, from the proof of facts and circumstances produced before him, there is probable cause to believe the defendants guilty of the offense charged; that the mode of proceeding in such cases is precisely the same, whether there is an indictment or no indictment (see also *Price vs. McCarty* (32 C. C. Am., 162; 89 Fed., 84 per Wallace, C. J.); and that an indictment, when

offered by the prosecution, is at best but evidence, in no way conclusive, and in truth is but secondary evidence (which to a certain extent is admissible on such examinations); and that although the copy of an indictment may be treated as an affidavit, it is nevertheless to be judged by the same rules as other affidavits and given weight only according to the nature and character of its averments, and the facts and circumstances which it sets forth, if any, in a manner sufficient to warrant the conclusion of probable cause to believe the accused guilty.'

"In accordance with the principles thus enunciated, the defendant is entitled to *a hearing and trial* before the Commissioner and an appeal from his decision, upon all the evidence, to the District Judge to whom application is made for removal. This gives a further opportunity for an indirect appeal to the Supreme Court by an application for a writ of *habeas-corpus* which results in delay even though the appeal be unavailing.

*Greene vs. Henkel,* 183 U. S., 249;
*Beavers vs. Henkel,* 194 U. S., 73".
(Rep. Att'y-Gen'l, 1904, p. 3.)

This is repeated in the Attorney-General's Report for 1905, p. 7.

---

The question of jurisdiction under the Federal Constitution is one far-reaching and fundamental. Under the statute, the party accused, is to be bound over for trial before such Court of the United States *as by law has cognizance of the offense.* Under the Constitution, the only Court of the United States which has cognizance is a Court of the United States sitting and trying the case in the State and district

wherein the crime shall have been committed. If therefore, the application to the Magistrate be to commit the prisoner for trial in a State and district in which the crime shall not have been committed, it is evident that the application would have to be refused. The injunctions of the law—constitutional and statutory—are imperative.

1. The accused can be tried only in the State and district in which the crime shall have been committed.

2. He can be bound over for trial or removal only to that particular specific State and district.

This also, it may be said, depends upon "probable cause," but it is a probable cause entirely independent of probable cause as to the guilt or innocence of the prisoner. Probable cause must exist and be brought to the attention of the Commissioner or Judge on two points.

First, probable cause that the district to which it is sought to remove the prisoner for trial is the proper district in which under the Constitution he is to be tried, and second, probable cause, whether or not the prisoner is guilty of the offense. The effect of an indictment found as proof of probable cause before the Commissioner has also been adjudicated by this Court.

In the cause of *Beavers vs. Henkel* (194 U. S., p. 73), the question came before this Court: It was there claimed on behalf of the Government that the indictment was conclusive of the existence of probable cause, as well of the jurisdiction, as of the guilt of the prisoner. This Court held, p. 85:

> "While the indictment is *prima facie* evidence, it is urged that there are substantial reasons why it should not be regarded as conclusive. . . . It is unnecessary to definitely determine this question. It is sufficient for this case to decide, as we do, that the

> indictment is *prima facie* evidence of the existence of probable cause."

And in the later case of *Hyde vs. Shine* (199 U. S., p. 84), this Court decided:

> "In this case, however, the production of the indictment made at least a *prima facie* case against the accused, and if the Commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause."

So far as the decisions of this Court are concerned, therefore, it has on this point decided that upon the question of *jurisdiction,* as well as of innocence or guilt, the Commissioner or committing Magistrate in considering the probative effect of the indictment, is to consider it as *prima facie* establishing probable cause on both questions, and it necessarily follows that what is *prima facie* is subject to rebuttal.

There is no case that has ever come before this Court in which the indictment has been treated as conclusive, or in which greater force has been accorded to it in its probative effect, than of making it *prima facie.*

Considering the original purpose and intent of the Constitutional provisions and of the wording of the statute, it is evident that to give it greater effect than to make it merely *prima facie,* would be in effect to destroy the whole force of the constitutional provisions. The history of the constitutional clauses themselves will show this. The original constitutional provision contained in Section 2 of Article III of the Constitution was, "that the trial of all crimes except in cases of impeachment shall be by jury and such trial shall be held in the State where the said crimes shall have been committed."

So fearful were the States forming the United States Constitution of the pressure of any provisions unjustly upon their citizens, that at the conventions of a number of them when they adopted the Constitution expressed their desire that a number of restrictive clauses should be added.

The result was that at the first meeting of the first Congress elected under the Constitution a resolution was passed declaring:

> "The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: . . . That the following articles be proposed to the legislatures of the several States as amendments to the Constitution of the United States," etc.
>
> *U. S. Stats. at Large,* Vol. 1, p. 97.

Under this resolution ten amendments were proposed and immediately ratified by the several States, of which the sixth is the one in question, where it was reiterated that in all criminal prosecutions the accused should be tried only by a jury of the State and district wherein the crime shall have been committed.

To say that an indictment in one district is to preclude him absolutely from questioning that district as the proper place for trial, would be to destroy the whole benefit of this Constitutional provision. Its intention was that a person should not be dragged from his home to a distant State for trial before an unknown jury, unless he has committed the crime there.

If the question of jurisdiction, however, is to be conclusively settled by the finding of a grand jury in that dis-

tant State, then the Constitutional provision is of no avail, for no matter what evidence he may be able to adduce to show error or mistake, he would none the less be dragged off for trial to this distant State and endure all the suffering and expense thereof, although it might appear upon trial that the Court in that District had no jurisdiction of the trial of the cause. The finding of a grand jury in that distant State should be of much less weight than the finding of a committing magistrate at the place of residence of the accused, where he can be heard by his witnesses. The object of the Constitutional provision is that the accused shall not be dragged off to a distant State for trial merely upon the propounding of an accusation by a grand-jury of which, and of whom, he has never heard. There is a wide difference as to the intent of the Constitutional provision upon the two questions involved. The question of jurisdiction is wholly independent of and prior to the question of guilt. Probable cause should exist of both before the man is subjected to trial, but probable cause of his guilt is very different from probable cause of the jurisdiction of the Court to try him. In the latter case he would be subjected to all the inconveniences and expense of a trial whether he be guilty or not, whereas in the prior case he would be simply subjected to trial under the charge made as to his innocence or guilt by a grand-jury in the district in which he should properly be tried.

A consideration of the Amendment; of the reasons inducing its passage and of the results intended to be effected, makes it patent that it was never intended that the *ex parte* finding of a grand-jury of a distant State, acting without the knowledge of the accused, should be conclusive against the party accused as to the jurisdiction and subject him to be dragged off to that State for trial.

When he is called before a magistrate to be committed for trial, he is faced by the witnesses making the charge—has an opportunity to cross-examine them and may even be heard by himself and witnesses so as to convince the magistrate there is not even probable cause for his commitment.

Before a foreign grand-jury it is entirely otherwise. He does not know who are the witnesses—he is not allowed to cross-examine—he may be even entirely ignorant that the grand-jury had an existence until the indictment as found is hurled at him.

It has never been held, however, by this Court, even upon the question of innocence or guilt, that the indictment had any greater effect than that of being *prima facie*.

From the beginning of the Government the universal holding of the United States Courts has been upon the question of innocence or guilt, that the indictment was only probative and *prima facie* and that the accused had the right to submit testimony in rebuttal of its effect as showing probable cause.

*A fortiori* as we have shown in the case of the question of jurisdiction, could its effect be no greater than merely *prima facie* and the party be entitled to rebut its effect by evidence to the contrary.

To put it concisely, the accused would be entitled on the jurisdictional question to show that the Court in which the indictment has been offered and found is not a Court having jurisdiction to try him of the offense whether he be guilty or innocent thereof.

It has been remarked by this Court in the case of *Beavers vs. Henkel* (194 *U. S.*, 82) that cases, such as an application for removal of a party accused from one district of the United States to another, are different from the ordinary

cases of extradition. Different even from the qualified extradition which arises when one State within the Union surrenders to another an alleged fugitive from its justice.

This Court said, in *Beavers vs. Henkel* (194 U. S., 85) that "it is sufficient for this case to decide, as we do, that the indictment is *prima facie* evidence of probable cause." The only evidence offered in that case by the "offender" was evidence tending to "expose what took place before the grand-jury" that found the indictment. This Court said that such evidence was not competent, and that a defendant could not in this way expose the Government's case and prepare the way for his defense. Consequently, the *only* "evidence" before the Court in that case was a copy of the indictment. It was with reference to this state of facts the Court said that the indictment was *prima facie* evidence of the existence of probable cause. Such was the langauge in which this Court saw fit to express the idea that when *nothing else appears* the indictment alone is sufficient authority for an order of removal. Strictly speaking, an indictment is not *evidence* in the legal sense. It is merely hearsay assertion as to the offender's guilt (2 Wigmore on Evidence, p. 1110); it is *secondary* evidence, which, to a certain extent is admissible on such examinations. (*U. S. vs. Green,* 100 Fed. Rep., 943.)

In *United States vs. Pope* (27 Federal Cases, No. 16069) Lowell, J., after stating that it had been doubted whether a copy of the indictment is evidence in removal cases, but that he had held in a certain case that it was, said:

> "This was a very convenient decision for the United States, and a sound one, but it *rests rather on long usage* than on any principle of law, because, generally speaking, an indictment is evidence of nothing

but its own existence, unless there is some statute giving it greater effect. It is but secondary evidence after all, or rather the statement of the result of evidence, and the better practice is to give primary evidence of criminality."

We did not contend below, nor do we now insist, that primary evidence of criminality or probable cause must be produced. The rule that a copy of the indictment, *nothing else appearing,* ought to be accepted as sufficient, is not only convenient for the Government, but does no injustice to the accused. In the absence of exculpatory evidence, a copy of the indictment may well be accepted as *equivalent* to an affidavit, as sufficient authority for removal—not because it is evidence in the legal or primary sense, but because such removal cases ought to be ranged with that class of cases wherein secondary or hearsay evidence is deemed good enough to be accepted. In that sense it is *prima facie* evidence of probable cause. It is *treated* as evidence, and as being sufficient under such circumstances. (49 F. R., 52.)

When it is said that there must be evidence of probable cause, what is meant is that the Court should be satisfied that there is evidence on which a jury *may* convict, (*United States vs. Fowkes* 49 F. R., 52); or at least proof furnishing good reasons to believe that the crime alleged has been committed by the accused. (*U. S. vs. Burr,* 25 Fed. Cas., No. 14692*a*.)

Appellants contend only for the right to present evidence which shows the absence of probable cause—to show a state of facts upon which *no jury in the Middle District of Tennessee* could convict. The indictment will not be "evidence," as against the evidence which appellants present. The indict-

ment is merely *treated* as evidence in removal cases, *when no evidence is offered* by the offender, showing the absence of probable cause.

The Attorney-General complains that the right of "offenders" to present evidence causes much embarrassment in the administration of the law. It is less, however, than officials charged with criminal prosecutions believe. True it is that guilty offenders who find nothing presented as evidence against them except a copy of an indictment, by vigorous swearing, might for the time go free; but in such cases the fault must be imputed to the prosecution. At comparatively little inconvenience to the Government, witnesses enough can be presented to prevent a discharge; for it is not necessary for the Government to prove guilt as upon a trial, but merely to prove enough, *taken by and within itself,* to show the existence of probable cause. True it is that the day of punishment might, in some cases, be delayed by the guilty, and that the rule upon which the Government insists makes the prosecution both of the guilty and of the innocent easier, more convenient to the Government, and more onerous and oppressive to the accused. But Judges remember, what prosecuting officers seem to forget, that in controversies between the Government and the individual he is entitled to reasonable protection; that there are risks to him and burdens which he ought not to have needlessly cast upon him; that the expense must necessarily be enormous, and in most cases beyond his ability to pay; and that in the matter of removals, the enforcement of the criminal law ought not to be oppressive. The question is presented to a District Judge and not to a plain Commissioner—a Judge as capable of determining the matter as is the Judge of the Court into which the indictment was returned. The fact that a rule adopted to protect

the innocent from peril and oppression, may possibly be taken advantage of by the guilty to delay punishment, is no reason for the abolition of the rule; we say *abolition,* because the rule now is as contended, and has been since Section 1014 of the Revised Statutes was enacted; and a *new* rule was applied against these appellants by the Court below.

We submit that they were erroneously denied their rights, and upon this ground alone are entitled to a reversal.

But it may be urged in behalf of the Government that the evidence offered for the appellants is "immaterial," and therefore that the case is one to be regarded as a case in which really no evidence was offered by them at all. The Circuit Judge held that inasmuch as the indictment charged that a conspiracy had been formed, and that an *overt act* had been committed in Tennessee, the *personal presence* of the appellants in Tennessee was not essential, and as a consequence the evidence offered was "immaterial."

In the minority opinion in *Hyde vs. Shine* (196 U. S., 62) it is said that if the defendants were not in the District of Columbia at the time the conspiracy for which they were indicted was formed, they could not be guilty of that crime.

The question in the present case is not whether a person in one State, can be guilty of the crime of conspiracy in another State without being personally present in the latter State where the conspiracy is formed. The question is not whether Mr. Kessler, being in Florida, could engage in or form a conspiracy in Tennessee, without being personally present in the latter State. The question is one altogether different. It is, whether, Mr. Kessler and fifty-six others having actually formed or engaged in a conspiracy (say) in the State of New York, the fact that some one of the fifty-six does some "act" in Tennessee to effect the object of the con-

spiracy, operates to make all of them guilty of committing the crime of conspiracy in the latter State, and to make them indictable for such crime *there*. Or, re-stated, the question is, not whether a man can engage in a conspiracy without being personally present, but whether when he has engaged in a conspiracy in one jurisdiction, the overt act of a co-conspirator in another jurisdiction has the effect to make the man commit the crime of conspiracy there also? Our position is that it does not, and under the Constitution of the United States cannot, have that effect.

## II.

*Persons proceeded against criminally for engaging in a conspiracy in violation of the Anti-Trust Act, must be indicted and tried in the district in which the crime was committed, that is, in the district in which they engaged in or formed the conspiracy. They cannot be indicted or tried for conspiracy in another district, upon the ground that jurisdiction can be taken of all, in any district in which any one of the conspirators commits an overt act in furtherance of the object of the conspiracy. No such jurisdiction exists.*

The notion that defendants can be tried for the crime of conspiracy wherever an "overt act" has been done, appears to have originated in 1787 in the unpublished case of *King vs. Bowers*. In the opinion delivered in 1803 in *King vs. Brisac* (4 East Term. Rep., 171) Grose, J., said that in *King vs. Bowers* no proof of *actual* conspiracy in Middlesex, where the trial took place, was given, and that it appeared that the "individual actings" of *some* of the defendants were wholly in counties other than Middlesex. But that as the conspiracy

had been proved against *all* "from the community of criminal purpose", and by their *joint* co-operation in forwarding its object in different places and counties, it was to be held that they could be presented and tried in Middlesex, because overt acts had been done by *some* of them there. That is to say, it was held that when it is proven that a conspiracy has been entered into, any or all of the conspirators may be tried in *any* county in which *any* of them do overt acts in prosecution of the consipracy.

*No reason is given.* All that is said is, that the "locality" required for the purpose of trial, was "holden to be satisfied" by the state of facts. Indeed, the facts of that case are not given.

It was upon the authority of this case that *King vs. Brisac* was decided in 1803. (4 East Term. Rep., 164.) The *facts* of that case were that Brisac and Scott, officers of the English Navy, on the ship Iris, then at sea, drew *false* vouchers (for money paid for provisions for the ship) on the Commissioners of the Victualling, in Middlesex County, England, and caused them to be presented *there* through persons entirely innocent of the fraud; and through them, in this way, got money from the Government. They were indicted in Middlesex. Scott fled, but Brisac stood his trial.

It was held that he was triable there. Grose, J., who delivered the opinion, said, that the *delivery* of the false vouchers with fraudulent intent, "through innocent persons as instruments," is *an offense* in the place where the vouchers were delivered, is a matter which cannot be doubted, though the conspiracy may have been in another place.

What he says, and all he says, is that it cannot be doubted that such a thing as this, "is an *offense* in the place where the vouchers were delivered."

Undeniably that is true. It was an offense—the offense of obtaining money under false pretenses, and that offense was committed when and where the money was obtained. The defendant, however, was *indicted* for engaging in a conspiracy, and he committed that offense either at Brassa Sound or Lerwick—outside of the county where he was indicted. The fact that it could not be doubted that he had committed *an offense* by the delivery of the false vouchers, and getting money from the Government thereon, in Middlesex is, we submit, no sufficient reason for holding that Captain Brisac could be indicted and tried for the *conspiracy,* in the County of Middlesex. The juridiction was sustained, however, by this reasoning:

> "It is to be recollected that conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place; and that from *analogy* there seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried wherever one distinct overt act of conspiracy is in fact committed, as well as the crime of high treason in compassing and imagning the king's death, or in conspiring to levy war."

As will be observed it was held that because *"an offense"* was committed in Middlesex, the defendants might be tried in that county for committing the offense of conspiracy, elsewhere upon the high seas; and for the reason that inasmuch as one guilty of high treason could be tried where any treasonable act was committed, "no reason" appeared why the crime of consipracy might not be tried wherever one distinct overt act of consipracy *was* committed.

The Supreme Court of Pennsylvania states the reason somewhat differently in *Commonwealth vs. Gillespie* (7 S. & R., 469; 10 Amer. Dec., 475), decided in 1822. After stating that conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which is rarely confined to one place, the Court, instead of resorting to the treason-argument, by way of "analogy," said that—

> "If the parties are linked in one community of design and of intent, there can be *no good reason* why both may not be tried where an overt act is committed."

The Supreme Court of Texas took the same view, and quoted with approval the above extract from *Commonwealth vs. Gillespie,* in *Ex parte Rogers.* (38 Amer. Rep., 656.)

It thus appears that the early view was that conspiracy was a matter of *inference;* that inasmuch as there appeared to be "no good reason" why the conspirators should not be tried, either where the conspiracy was formed *or* where an overt act was done, and inasmuch as traitors could be tried wherever any act of treason was committed, it must be proper to try conspirators, guilty only of a misdeamanor, either where the conspiracy was committed, or where any overt act was done by any of them.

It is obvious that these reasons are inadequate. Conspiracy is *not* a matter of inference, but a fact—to be proven by evidence like any other fact. As with many other crimes, it is often to be proven by circumstances; and of course, guilt in such cases is an inference deduced from circumstantial evidence. Treason consists in something more than

mere intent. In these times *acts* are required, and as a consequence, the argument by analogy fails. To say that there is "no good reason" why a conspirator may *not* be tried in divers places, is hardly to state a good reason why he *should*, in view of the *Constitutional* provision *fixing* the venue. It certainly is not a sufficient argument to show that conspiracy should be an exception to the Constitutional provision which makes *one express* exception (impeachment) *and no more.*

The Supreme Court of New York had occasion to consider the question of conspiracy in 1830 in *People vs. Mather* (4 Wend., 229; 21 Am. Dec., 122) wherein the defendants were indicted for a conspiracy to abduct William Morgan, the man who it is alleged exposed Free Masonry. The Court said that conspirators could be proceeded against in any county where an overt act was committed, for the reason that "the law considers that where they act, there they *renew*, or perhaps, to speak more properly, they *continue* their agreement, and this agreement is renewed, or continued as to *all* wherever any *one* of them does an act in furtherance of their common design." Having said this, the Court then observed that unless this proposition is correct, "the decisions can be accounted for on no other principle." The Court appeared to labor under the impression that decisions *had* to be accounted for on some principle, failing to remember that judicial decisions sometimes can be accounted for on no logical principle at all.

In *Noyes vs. The State* (41 New Jersey Law, 418) it appeared that the defendant and others were indicted for engaging in a conspiracy to defraud the stockholders of a New Jersey Life Insurance Company. The scheme was to turn over the company and its assets to a New York corporation in such manner as that it was a fraud on the New Jersey

corporation and its stockholders. The conspiracy to do this was arranged in New York, and the president of the New Jersey corporation, Mr. Stillwell, there delivered a regular written assignment to the defendant, Noyes, authorizing him to take charge of the New Jersey concern.

The indictment was found in New Jersey. The point was made for the defendant that inasmuch as the conspiracy had been formed in New York, Noyes could not be indicted in New Jersey. But it further appeared that Noyes had gone to New Jersey with his assignment to take charge, and that in the latter State, Stillwell, the president of the New Jersey corporation, *through his subordinate agents,* co-operated with Noyes, *in New Jersey,* in turning over the office and assets. The Court held that these acts on the part of Noyes and Stillwell, who were jointly indicted, presented a different question, and that by such "joint act the conspiracy was renewed and *partly executed* in this State in the County of Essex, and that *thus* the agreement became cognizable by the courts of that locality." The Court said that if the fact that the conspiracy had been formed in New York, and that Noyes had been the only one of the conspirators who came into New Jersey and there performed an act in pursuance of the conspiracy, "it might be difficult to sustain, on specific grounds, the judicial jurisdiction of this State over the offense." And upon that point the Court added:

> "And accordingly this is the jurisdictional feature relied on by the State, the theory being that in whatever place one of the conspirators does an act in furtherance of the common design, the illegal agreement is thereby renewed as to all, and consequently, the locality of the crime is by the same means changed as to all. But no authority has been cited in support

of this proposition. At least no authority that is opposite. The cases referred to go no further than to hold that this legal intendment, that the act of one confederate is the act of all, will arise when such act is done within the *same jurisdiction* in which the conspiracy occurred. The principle is one relating to mere venue, and not to international jurisdiction."

The Court shows that *People vs. Mather* (4 Wend., 229 involved merely the question whether a conspiracy committed in the State should be tried in the county where the conspiracy was formed, or might be tried in some other county of *that* State, in which acts were done to perfect its object.

Chief Justice Beasley said that the inclination of his mind was against the extension of such power beyond the limits already clearly defined.

In the course of the opinion the Court further said that an indictment charging a conspiracy to commit several distinct crimes, charged only one crime: that the criminal act was an unit; and also remarked upon the necessity of not confounding the crime which is the conspiracy, with the crime which is the object of the conspiracy.

The decision from which this rule is deduced was made in the English Courts and it has been followed in the several States of the United States, in their application only to *counties,* viz.: that in the case of a conspiracy the trial could be had either in the *county* in which the conspiracy was entered into, or in any *county* in which an over act was committed. These decisions were made in their application only to counties unde one general national jurisdiction.

---

The acts alleged in this indictment to be overt acts are merely colorless, indifferent acts done by the defendants

respectively charged with doing them in the conduct of their own business. They are not acts which in themselves tend in the least to sustain or show the evil design, or tend to its accomplishment.

The averment of each of these alleged overt acts in the first count of the indictment is:

> "In pursuance of the said unlawful conspiracy and to effect the object of the same, and as an act on his (or its) part of engaging in the same."

The defendant particularly named, in the Middle District of Tennessee, did the act averred. (Rec. No. 369, pp. 21-34.) It in substance is so averred in the second count, and perhaps in the third count, and in the fourth count. (*Ib.*, p. 37; pp. 40-44.) But in none of the counts are any of these acts charged to have been done as an act of engaging in a conspiracy on the part of any other defendant than the one charged with doing the act. These alleged acts are as follows:

1. That the Virginia-Carolina Chemical Company, by Watkins, its agent, on July 23, 1903, at Decherd, in the Middle District of Tennessee, did unlawfully and knowingly offer and agree to furnish and deliver to one Haynes at Decherd, aforesaid, sixty-five tons of fertilizer merchandise. (Rec. No. 369, p. 21.)

2. That said Chemical Company delivered to Haynes at Decherd aforesaid, on September 20, 1903, fifteen tons of such merchandise. (*Ib.*, p. 21.)

3. That said Chemical Company on July 23, 1904, offered to furnish to said Haynes seventy-five tons of such merchandise. (*Id.*, p. 21.)

4. That said Chemical Company on September 26, 1904,

caused to be delivered to said Haynes at Decherd aforesaid fifteen tons of said merchandise. (*Id.*, p. 22.)

5. That said Armour & Company on March 10, 1905, at Nashville, in said Middle District of Tennessee, by one Leslie, its agent, unlawfuly and knowingly did deposit in the postoffice there, addressed and to be sent and delivered by mail, to the Bramlitt Hardware Company, at Corinth, Mississippi, a certain notice of shipment, partly written and partly printed, in the words and figures following:

> "The Armour Fertilizer Works, owned and operated by Armour & Company, Prudential Building, Atlanta, Ga. Duplicate to be mailed with bill of lading to customer. No. 612. March 10, 1905.
>
> "We have this day shipped from Nashville, Tenn., storage to Bramlitt Hdw. Co., Corinth, Miss. Charge to S. D. Bramlitt. Address same. No. bags, 400; weight of bags, 100; brand, King Cotton 8.2.2; tons, 20. Order No. 4613. Bill of lading herewith. Invoice will be mailed from Chicago. Above quantities shipped 3-10, 1905. Freight terms . . . Car No. 13619. Via L. & N. Charges prepaid, $48.00.
>
> "The Armour Fertilizer Works,
> *Per Alex. Leslie.*"

(*Id.*, p. 22.)

6. That said Armour & Company on March 10, 1905, at West Nashville in said Middle District of Tennessee, unlawfuly did knowingly deliver to the Louisville & Nashville Railroad Company, for shipment by rail to Corinth in the State of Mississippi, consigned to said Bramlitt Hardware Company at that place, twenty tons of the fertilizer merchadise aforesaid. (*Id.*, p. 22.)

7. That the said Armour & Company, on September 14, 1904, at said West Nashville, unlawfully did knowingly

deliver to the Nashville, Chattanooga & St. Louis Railway fifteen tons of the fertilizer merchandise aforesaid, consigned and to be shipped to one Duncan, at Jonesboro, in the State of Tennessee. (*Id.*, p. 23.)

8. That said Federal Chemical Company, on December 28, 1903, at West Nashville aforesaid, unlawfully did knowingly deliver to the Louisville & Nashville Railroad Company, fifteen tons of the fertilizer merchandise aforesaid, consigned and to be shipped to one Walker, at Athens, Alabama. (*Id.*, pp. 25-26.)

9. That said Federal Chemical Company, on February 2, 1904, at West Nashville aforesaid, unlawfuly did knowingly deliver to the Nashville, Chattanoga & St. Louis Railway twenty tons of the fertilizer merchandise aforesaid, consigned and to be shipped to the firm of Hendricks Brothers & McGavock, at Athens, Alabama. (*Id.*, p. 26.)

10. That said Furman Farm Improvement Company, on January 11, 1904, at Springfield, in said Middle District of Tennessee, unlawfully did knowingly offer to furnish to the firm of Fiser, Orndorff & Williams, retail dealers in fertilizers, one hundred and forty tons of such fertilizer merchandise. (*Id.*, p. 26.)

11. That said Furman Improvement Company, on April 4, 1904, at Chattanooga, Tennessee, unlawfully did knowingly deliver to the Nashville, Chattanooga & St. Louis Railway, fifteen tons of said fertilizer merchandise, consigned and for shipment through the said States of Alabama and Georgia, to the said firm of Fiser, Orndorff & Williams at Springfield aforesaid. (*Id.*, p. 26.)

12. That the said Furman Farm Improvement Company, on April 6, 1904, at Springfield aforesaid, unlawfully did knowingly cause to be delivered to said firm of Fiser. Orndorff

& Williams, fifteen tons of said fertilizer merchandise. (*Id.*, p. 26.)

13. That said Marietta Fertilizer Company on July 21, 1904, at and within the town of Jonesboro, in the State of Tennessee, by one Reeves, its agent, unlawfully did knowingly offer and agree to furnish and deliver to one Boyd, at Jonesboro aforesaid, seventy-five tons of the fertilizer merchandise aforesaid. (*Id.*, p. 28.)

14. That said James G. Tinsley, on December 3, 1903, at Nashville, in said Middle District of Tennessee, as Vice President of said Tennessee Chemical Company, unlawfully did sign his name, with his official designation, "James G. Tinsley, V. P.," to a certain check drawn by said Tennessee Chemical Company upon the Bank of America, New York, for $6,792, to the order of said Tinsley; he, the said Tinsley, then and there well knowing the contents of the same and that his said act was done in pursuance and to effect the object of said unlawful conspiracy, and was an act on his part of engaging in the same. (*Id.*, p. 28.)

15. That said National Fertilizer Company, on March 2, 1905, in said Middle District of Tennessee, unlawfully did knowingly deliver to the Louisville & Nashville Railroad Company, for shipment by rail to Cullman, Alabama, consigned to one Williams at that place, twenty tons of the fertilizer merchandise aforesaid. (*Id.*, pp. 28-29.)

16. That said Rhea, on October 6, 1903, at Nashville aforesaid, unlawfully did direct and require one Connell, Treasurer of said National Fertilizer Company, to sign his the said Connell's name as treasurer to a certain check drawn by said National Fertilizer Company upon the American National Bank of Nashville for $480, to the order of one F. Burbidge, he, said Rhea, then and there well knowing

the nature and contents of the said check, and that his said direction and requirement were in pursuance and to effect the object of the said unlawful conspiracy as aforesaid, and that it was an act on his part of engaging in the same. (*Id.*, p. 29.)

17. That said Rhea, on January 23, 1905, at and within the County of Davidson, in said Middle District of Tennessee, unlawfully did sign his name, "Wm. D. Rhea," after the word "approved" and before the word "Manager," upon the face of a certain printed document, whereby said National Fertilizer Company offered to sell and deliver to one Boyd, at Jonesboro, Tennessee, fifty tons of the fertilizer merchandise aforesaid; he the said Rhea then and there well knowing, etc., (as before.) (*Id.*, p. 29.)

18.—That said Abram C. Read, on November 19, 1903, at the County of Davidson, in said Middle District of Tennessee, unlawfully did knowingly sign his name, "A. C. Read," after the word "approved" and above the word "Manager," upon the face of a certain document, whereby said Read Phosphate Company offered to furnish and deliver at Hartselle, Alabama, to one Stewart, forty to sixty tons of the fertilizer merchandise aforesaid; he said Read then and there well knowing, etc., (as before). (*Id.*, pp. 30-31.)

19. That said Read, on the sixth day of December, 1904, at said County of Davidson, in said Middle District of Tennessee, unlawfully did sign his name, "A. C. Read," after the words, "Approved, Nashville, Tenn., Dec. 6, 1904," and above the word "Manager," upon the face of a certain other printed document, whereby said Read Phosphate Company and he the said Read as manager thereof, offered to sell to said Stewart and to deliver to him at Hartselle, Alabama, forty to fifty tons of the fertilizer merchandise aforesaid;

he, said Read, then and there well knowing, etc., (as before). (*Id.*, p. 31.)

20. That said Swift & Company, on August 1, 1904, at and within the town of Jonesboro, in the State of Tennessee, by its agent, Elliott, unlawfully did knowingly offer to furnish to one Diehl thirty tons of such fertilizer merchandise. (*Id.*, p. 33.)

21. That said Tennessee Chemical Company on March 16, 1905, at West Nashville, in said Middle District, unlawfully did knowingly deliver to the Louisville & Nashville Railroad Company twenty tons of the fertilizer merchandise aforesaid, consigned and to be shipped to the firm of D. P. Haynes & Brother, at Chaccalacca, Alabama. (*Id.*, p. 33.)

22. That said T. Garland Tinsley, on May 17, 1905, at Nashville, in said Middle District of Tennessee, unlawfully did cause to be written and sent by mail to Haynes & Brother, at Oxford, Alabama, a certain letter of the tenor following, to-wit:

"T. G. Tinsley, President and Treasurer.
"Allen Hardison, Secretary.
"TENNESSEE CHEMICAL COMPANY, MANUFACTURERS AND IMPORTERS OF OX FERTILIZERS.
"NASHVILLE, TENN., May 17, 1905.

"*Messrs. D. P. Haynes & Bro., Oxford, Ala.*

"Dear Sirs: I am in receipt of your favor of the 16th and beg to state we could not allow any discount further than the 5 per cent. for cash settlement. We will be glad to have you settle in cash on this basis if you desire to do so, but we are sorry to state that we are not in a position to offer you any further discount. Yours truly,

T. G. TINSLEY, *President;*"

he the said T. Garland Tinsley then and there well knowing, etc., (as before). (*Id.*, pp. 33-34.)

23. That the said T. Garland Tinsley, on June 25, 1904, at said West Nashville, as attorney of the said James G. Tinsley unlawfully did write an indorsement, to-wit.: "Pay to order Colonial Development Company, James G. Tinsley. By T. G. Tinsley, Atty.," on the back of a certain check drawn by said Tennessee Chemical Company upon the Mercantile National Bank of New York, for $1,625.08, to the order of James G. Tinsley; he said T. Garland Tinsley well knowing, etc., (as before). (*Id.*, p. 34.)

It will be first observed of each of these alleged acts:

That none of them are averred to be acts of selling or buying or to have been done in the course of in connection with any selling or buying of merchandise in inter-state commerce. If acts of selling and buying, they are not averred to have been at fixed, uniform or non-competitive prices, or to have been non-competitive, which is the gist of the alleged offense. Many of them, *e. g.*, acts numbered *supra* 1, 2, 3, 4, 7, 10, 12, 13, 17, and 20, if acts of trade and commerce, were, as averred, acts of *intra-state* and not *inter-state* trade and commerce. Acts 14, 16, 18, and 19 are not averred and do not appear to be acts in or in connection with inter-state commerce. The rest of said alleged acts, viz.: acts 5, 6, 7, 8, 9, 11, 15, and 21 (being acts of delivery of merchandise to a common carrier, consigned and to be shipped to a consignee in the same or another State), if they appear to be acts of inter-state trade and commerce at all, are only so as to transportation, as to which there is no charge in the indictment, when properly construed, of a conspiracy in restraint of trade.

It will be further observed of each of the alleged acts averred to have taken place in the Middle District of Tennessee to effect the object of the conspiracy, (and this is of controlling importance,) that the acts are in themselves, as they are there averred, innocent and indifferent acts, which afford no evidence whatever tending to show either the engaging in any conspiracy or the purpose of carrying out its corrupt object.

The theory on which the Government bases its contention that the act of one individual conspirator in the Middle District of Tennessee can be held to establish the fact that all the alleged co-conspirators engaged in the conspiracy charged, in the Middle District of Tennessee, must be that of the application of the principle on which the acts of one conspirator are received in evidence against his co-conspirators. That theory is that each conspirator, by the act of his co-conspirators in engaging in the conspiracy is made the agent of each co-conspirator to promote and further the corrupt or unlawful design of the conspiracy. It is an application of the principle, *qui facit per alium facit per se.* The principle on which this doctrine is based is thus laid down by Greenleaf in his work on Evidence:

> "The principle on which *the acts and declarations of other conspirators,* and acts done at different times, are admitted in evidence against the persons prosecuted, is, that by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by one, in furtherance of that design, a part of the *res gestae,* and therefore the act of all. It is the same principle of identity with each other, that governs in regard to the acts and admissions of agents, when offered in evidence

against their principals, and of partners, as against the partnership, which has already been considered. And here, also, as in those cases, the evidence of what was said and done by the other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending, and in furtherance of the design; what was said or done by them before or afterwards not being within the principle of admissibility."

3 Greenl. Evi., Sec. 94.

See, also:

*New York Guaranty Co. vs. Nelson,* 78 N. Y., 503, 514.

In Carson on Criminal Conspiracies (11 Text Book Series, 1887), 213, in speaking of the admission of acts and declarations of co-conspirators, it is said:

"It is the principle of *agency,* which, when once established, binds the conspirators together and makes them mutually responsible for the acts and declarations of each."

And again:

"The acts and declarations of a conspirator to be admissible in evidence to charge his fellows must have been concomitant with the principal act, and so connected with it as to constitute a part of the *res gestae.*"

*Id.,* 217.

The overt act done, then, must be such an act as is within the scope and purpose of the agency; that is, to effect or accomplish, *by concerted action,* the criminal or unlawful purpose of the conspiracy, or the purpose by criminal or unlawful means, as the conspiracy is defined by this Court in *Pettibone vs. United States,* 148 U. S., 197, 203.

It is plain, however, that while no act, not so admissible in evidence as being within the scope and purpose of the agency, could be taken to be an overt act as against other parties to a conspiracy, not every fact or act that would be so admissible in evidence would amount to the distinct overt, unlawful act, which, under the ruling of the common law cases cited against us, would be held to establish the crime of conspiracy within the jurisdiction where such overt act was committed. That will appear from our later consideration of those cases. But it will be here observed that none of those alleged acts which are averred in the indictment to have been done in the Middle District of Tennessee, would, as they are averred, be even admissible in evidence as acts from which (with others) a conspiracy might be inferred as against other persons than the one doing the act. (Archb. Cr. Pr. & Pl., 8th Ed. by Pomeroy, p. 1845, *p. 621.)

Obviously an act done by a single defendant, in the conduct of his own legitimate business and without any concert with the other defendants, of such a nature as he would do in the proper conduct of such business, cannot be relied upon by the Government as the act of all the defendants of engaging in an unlawful conspiracy. *The authorities cited refute the Government's contention.*

In *Hyde vs. Shine* (199 U. S., p. 76) it is said in the majority opinion, that it was there "unnecessary to consider whether an indictment will lie within the jurisdiction where the overt act is committed, though there are many authorities to that effect. (*King vs. Brisac,* 4 East Rep., 164; *People vs. Mather,* 4 Wend. (N. Y.), 229; *Commonwealth vs. Gillespie,* 7 S. & R., 469; *Commonwealth vs. Corlies,* 5 Brewst. (Pa.), 575.) We have ourselves decided that, if the conspiracy be entered into within the jurisdiction of the trial

Court, the indictment will lie there, though the overt act is shown to have been committed in another jurisdiction, or even in a foreign country. (*Dealy vs. United States,* 152 U. S., 539; *In re Palliser,* 136 U. S., 257.")

We maintain that the ruling in the English and the State cases above referred to cannot apply here to take away or diminish the right of the citizen which is guaranteed by the Federal Constitution, to be indicted and tried in the State and district where the alleged offense was committed.

It is not here a *mere* question of venue, but of Constitutional right which cannot be taken away or impaired by a mere constructive commission of a crime. As the so-called overt act is no part of the crime of conspiracy, obviously it cannot of itself be or amount to the commission of the offense of engaging in the conspiracy in the State or district where the overt act is committed. As the overt act is no part of the conspiracy, and as a conspiracy entered into in one jurisdiction is indictable there although the overt act is committed in another, such a case is not one within Section 731 of the Revised Statutes. If the common law rule of decision in the cases above cited were as extended as counsel for the Government maintain, it would require very clear and positive authority to establish the rule that in view of the provisions of the Federal Constitution, one can be indicted for conspiracy in violation of the Sherman Act in any district where one of the alleged conspirators sees fit to do any proper act in the further conduct of his own legitimate business.

But if the common law rule of venue announced in those cases on which the Government relies, were held applicable, in our Federal Courts, to cases involving Clause three of Section two of Article three of the Constitution and the

Sixth Amendment, *an examination of those authorities will demonstrate that they do not at all sustain, but refute, the Government's contention here.*

*The King vs. Brisac,* 4 East, 164, at p. 171;
*People vs. Mather,* 4 Wendell, 259-260;
Archbold Crim. Prac. & Pldg., 1056;
*Commonwealth vs. Bartilson,* 85 Pa. St., pp. 488, 489;
*Commonwealth vs. Gillespie,* 7 S. & R., p. 478;
Bouvier's Law Dict. Tit. Overt.

It will be borne in mind in considering this question, that we are not here concerned as to the sufficiency of the act which is required by Section 5440 of the Revised Statutes merely as a condition of prosecution; but with quite a different question, viz., as to the nature of the "distinct overt act" which can be relied on as constituting or establishing the commission of the offense of conspiracy in the jurisdiction where such overt act was done.

The common law ruling in the above cases and which counsel for the Government here invokes, has this well settled limitation: *That the "distinct overt act," which may be relied on as making conspirators liable to indictment where such act is committed, must be such a distinct act as in itself proves or at least tends to prove the crime. It must manifest the criminal purpose. It must be one of those acts* (*i. e.,* an act of that nature) *from which the criminal conspiracy may be inferred.* (*Same authorities.*)

In the case in which the doctrine was first announced that the crime of conspiracy may be tried "wherever one distinct overt act of conspiracy is in fact committed", and which is the authority on which later cases are based,—the Court in so ruling, adopted the rule from analogy to that laid down in

England in cases of treason; and applied the same rule to the case of *criminal acts* of conspirators. (*King vs. Brisac*, 4 East, 171.)

So in *People vs. Mather* (4 Wendell, 259-60) the Court in following the *Brisac Case* and ruling that the law considers that wherever the conspirators act they continue or renew their agreement, and that it is renewed or continued as to all whenever one of them commits an act in furtherance of their common design, further said:

> "In this respect, conspiracy resembles treason in England, when directed against the life of the king. The crime consists in imagining the death of the king. In contemplation of law, the crime is committed wherever the traitor is, and furnishes proof of his wicked intention by the exhibition of any overt act."

Now, an overt act, in treason, "is one which manifests the intention of the traitor to commit treason." (Bouvier L. Dic., title *Overt;* citing Archb. Cr. Pl., 379; 4 Blackst. Com., 79.) Or, as said in *People vs. Mather, supra,* it is one which "furnishes proof of his wicked intention."

In Bouvier's Law Dictionary, tit. OVERT, it is said:

> "An overt act in treason is proof of the intention of the traitor, because it opens his designs; without an overt act, treason cannot be committed. (2 Chitty Cr. Law, 40.) An overt act, then, is one which manifests the intention of the traitor to commit treason."

So the overt acts in conspiracy from which the crime of conspiracy may by inference be deduced are, as stated in *King vs. Brisac, supra,* "criminal acts of the parties accused, done in pursuance of an *apparent criminal* purpose in common between them." The required act is there called a "dis-

tinct overt act of conspiracy." And so in *Com. vs. Gillespie* (75 S. & R., 478).

In Archbold's Criminal Practice and Pleading (8th Ed. by Pomeroy, Vol. 2, pp. 1843-4, star p. 620) it is said:

> "Every overt act, to be evidence, must have at least a tendency to prove either the general nature of the conspiracy, or that one or more of the defendants were operating towards effecting that which is charged in the indictment as being the object of the conspiracy."

In *Commonwealth vs. Bartilson* (85 Pa. St., 488, 489) a case cited and relied on by counsel for the Government in the Court below to sustain the doctrine that any conspiracy or venue "may be laid in any county in which an overt act has been done by any one of the conspirators," the Court based this doctrine:

> "Upon the principle that the overt act is evidence of a conspiracy existing at the time and place where the overt act was committed. Of course, the overt act must be such as to tend to show that it was the result of a conspiracy. As is said in Arch. C. P. & P., 1056, 'Every overt act, to be evidence, must have at least a tendency to prove either the general nature of the conspiracy, or that one or more of the defendants were operating towards effecting that which is charged in the indictment as being the object of the conspiracy.'"
>
> 85 Pa. St., p. 489.

And so in each of the cases cited by counsel to sustain the position that a conspiracy may be tried in the jurisdiction where an overt act is done, the overt act was, in and of itself, convincing proof of the crime. It was a distinct criminal

act, in the accomplishment of the corrupt purpose of the conspiracy.

In *King vs. Brisac* (4 East, 164), as already stated, officers of an English ship engaged in a conspiracy upon the high seas to fabricate false vouchers to cheat the Crown and to obtain the money thereon. The acts proved to be done in Middlesex, where the indictment was returned and the trial had, were the delivery of the false vouchers to the Government officers by third and innocent persons through whom the defendants transmitted the same, and the application to the Government for and the receipt of payment by a letter or bill of exchange drawn by the conspirators to pay such fraudulent vouchers. It was contended on behalf of one of the conspirators that the gist of the offense having been committed upon the high seas, was triable under the admiralty commission directed by certain statutes. This contention was resisted by counsel for the Crown, "because a conspiracy was an offense not merely resting in the mind, but shown by overt acts done to carry it into execution; and here the information stated, that in further pursuance of the conspiracy the defendants caused the false vouchers to be sent to the Commissioners for victualling the navy, and did deliver the same to them, etc., and did utter and publish the same as true; all of which were proved to have happened in the county of Middlesex;" and that "the letter conveying the bill of exchange, which had been put into the post at Lerwick by one of the conspirators to be delivered in Middlesex, and which was accordingly there delivered, was an act done there in furtherance of the conspiracy, for which both the conspirators were answerable as much as if it had been delivered there by their own hands; and so the act of receiving the money upon

it afterwards at Somerset House by the holder is also imputable to those by whose procurance it was thus done."

In holding that the crime of conspiracy may be tried wherever one distinct act of conspiracy is in fact committed, the Court, as above stated, bases it upon the ground that "conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place."

The Court also held, in the *Brisac Case,* that the alleged overt act was itself the criminal act for which the conspiracy was formed, and that the judgment of conviction was sustainable under a count of the indictment charging that substantive crime.

In *Commonwealth vs. Gillespie* (7 Serg. & R., 469) the overt act in question was the commission of the very criminal act for which the conspiracy was formed. The ruling there in effect was, that "he who procures another to commit a misdemeanor is guilty of the fact, in whatever place it is committed by the procuree." The Court said:

> "It makes no difference where Gillespie resided, if he conspired to sell New York lottery tickets in Pennsylvania, with his agent, and the agent effected the act, the object of the unlawful conspiracy, he is answerable criminally to our laws. In this offense there is no accessary. It must be recollected the conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them, and which rarely are confined to one place; and if the parties are linked in one community of design, and of interest, there can be no good reason why both may not be tried, where one distinct overt act is committed.

For he who procures another to commit a misdemeanor, is guilty of the fact, in whatever place it is committed by the procuree."

7 Serg. & R., 478.

In *People vs. Arnold* (46 Mich., 268) the ruling was that the verdict of conviction should be set aside for insufficiency of the information, and the information quashed; and, as the Court there said, it was not very essential that anything should be said at that time upon other questions. But it was laid down that according to the common-law precedents, the conspiracy might be tried wherever an overt act in pursuance of the conspiracy takes place. But the overt act there was *the commission of the very crime for the accomplishment of which the conspiracy was formed.*

In *People vs. Mather* (4 Wend., 229) the indictment on which the defendant was tried in the county of Orleans charged defendant with conspiring with others to assault Morgan and falsely imprison him, and to carry him off and secrete him in places to the jurors unknown; and, as overt acts, charged that defendant and the other persons in said county of Orleans did assault Morgan and against his will imprison him, and unlawfully and against his will did carry him off to places unknown to the jurors.

The question was whether defendant Mather was liable to conviction as a conspirator under this indictment, upon proof of his assistance in carrying the conspiracy into execution after it was formed, although the jury should not be satisfied that he was a party to the conspiracy at its inception.

The trial Court instructed the jury that the evidence established the fact that *however guilty Mather might be in aiding the execution of the conspiracy,* he was not a party to

it originally; and that although the jury should be satisfied that Mather *assisted in carrying the conspiracy into execution* after its formation, that fact, in the opinion of the Court, would not constitute him a party. The Court held, upon a motion for a new trial by the prosecution, that this ruling was erroneous, and that whenever a new party concurs in the plans originally formed by the conspirators and comes in to aid in the execution of them, he is from that moment a fellow conspirator; and that he commits the offense whenever he appears to become a party to the transaction, or does any act in furtherance of the original design. But the Court refused to grant the motion for a new trial on account of this misdirection or error of the trial Court. It was in connection with the discussion of this error that the Court said (p. 259):

> "In indictments for conspiracy the venue may be laid in any county in which it can be proved that an *overt act* was done by any one of the conspirators in furtherance of their common design."
>
> Archb. Crim. P., 6.

And after citing *Rex vs. Brisac,* the Court further said:

> "If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act, there they renew, or perhaps, to speak more properly, they continue their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance

> of their common design. In this respect, conspiracy resembles treason in England, when directed against the life of the king. The crime consists in imagining the death of the king. In contemplation of law, the crime is committed wherever the traitor is, and furnishes proof of his wicked intention by the exhibition of the overt act."

It will be difficult to discover any evidence of "wicked intention" in any of the different acts averred in this indictment to have taken place in the Middle District of Tennessee.

The question is an open one in this Court. In *Hyde vs. Shine* (199 U. S., 76) the Court said that in view of the averments of the indictment it was not necessary "to consider whether an indictment will lie within the jurisdiction where the overt act was committed, though there are many authorities to that effect."

---

*No indictment lies for conspiracy in any district other than that in which the conspiracy was engaged in, or committed; it does not lie in another district in which same co-conspirator may have committed an act in furtherance of the object of the conspiracy.*

Article 3, Section 2, of the Federal Constitution provides that *all* crimes, except *impeachments,* shall be tried in the State in which the crime shall have been committed, but when not committed within any State, the trial shall be at such place as the Congress may by law have directed.

The Sixth Amendment provides that in all criminal prosecutions the accused shall be tried in the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

As will be observed there is one exception—"impeachment;" and the *expression* of the exception excludes the idea that any other offense than impeachment should be excepted, by implication.

The language of the Constitution is so clear and plain that no decision was required for us to be able to understand that the *locality* in which an offense is charged to have been committed, *determines* the place in which, and the Court by which, the trial shall be had. However, there is a decision exactly to that effect. (*Beavers vs. Henkel,* 194 U. S., 83.) It follows that whenever it appears that a crime has been committed, the question of venue, or the place where it was committed, is the first one to be determined in order to bring the offenders to trial. In order to conviction for crime, the crime must be an accomplished fact, that is, it must be a completed thing under the provisions or definition of the criminal statute, and must have a local habitation as well as name. People cannot commit the crime of conspiracy unless they commit it *somewhere;* and under the Constitution, that "somewhere" is the only place, State or district, in which they can be brought to trial.

It matters not that conspiracies are usually formed in secret, or under cover of darkness, nor that a wicked purpose, or criminal intent (an intangible thing) is an important element in the crime, nor that these conditions make the proof of guilt difficult.

It matters not, because there *is* such a crime as conspiracy, and it must be committed *somewhere;* the conspirators must be proven to be guilty; and the proof must be made and they must be brought to trial in the State and district where that crime called conspiracy was committed, *and nowhere else.* This is a Constitutional right.

An indictment does not lie for conspiracy under Federal law in a district other than that in which that crime of conspiracy was committed, for that an "overt act" was committed in such other district, *unless* one of two things be true; (1) unless it be that the overt act is an element or ingredient in, or an essential part of the crime of conspiracy and essential to its complete commission; (2) or unless it be that the overt act renews or continues the conspiracy, and thereby makes a new one. Neither of these propositions is true. *The crime of conspiracy under Federal law is committed when and where the wicked agreement is made; and the overt act is not an ingredient or part of it.*

Undeniably it was permissible for Congress to define the crime of conspiracy. Congress *could* have said that a conspiracy is a combination of two or more persons to do an illegal act, *or* to do an act lawful in itself by unlawful means. It could, if so minded, add to this definition still another element: It could say that a conspiracy shall be a combination of two or more persons to do an illegal act, or to do an act not illegal in itself by illegal means, *and some overt act done in pursuance thereof.* In one case the conspiracy would be complete without an overt act—complete in that the crime would be *committed,* when and wherever the combination was made.

In the other case, the crime would not be complete; it would not be committed, until an overt act had been done. In this latter case it would be possible for the criminal agreement to be made in one jurisdiction, and the overt act to be done in another. In such case the question of the place of trial, or venue, would become important. The case would then be one really in which the offense was committed in both jurisdictions, and, therefore, one in which the offenders

could be brought to trial in either. But this would be strictly in accordance with the requirement of the Constitution that the accused must be brought to trial in the district where the crime was committed.

The State of Tennessee has, by statute, made an "act" an essential element in the crime of conspiracy. In this respect, it has modified the definition of the crime as it existed at common law. The Code of Tennessee (§ 6695) provides that "no agreement shall be deemed a conspiracy unless some act be done to effect the object thereof," except conspiracies to commit arson, burglary, and a felony on the person of another. Congress could of course have done the same thing.

The question now under consideration is one of Federal law. The sole inquiry is, When is the crime of "conspiracy" under Federal law, committed? Is it "committed" when and where the wicked agreement is made, or, is it inchoate and incomplete, and therefore not committed (as in Tennessee) until some *act* has been done to effect the object of the agreement? If the crime of conspiracy be completed so soon as the combination is made, the place where it was made must determine the venue, or place of trial, regardless of the place where some overt act may be committed, or whether there ever be any overt act at all.

Upon the other hand, if under the Federal Statutes, an "act" done to effect the object of the conspiracy is an essential part of the crime itself—made an ingredient, or element thereof by the statute, it must follow that such crime is committed where the agreement was made *and* where the act was done which completed it; and if they were done in different jurisdictions, the crime was committed in both, and therefore is indictable in either, under Section 731 of the Revised Statutes of the United States.

Investigation discloses that the crime of conspiracy, under the laws of the United States, is committed whenever and wherever the combination is made; and that an act, or as it is called, an "overt act," to effectuate the object of the agreement, is *not* an element in, or part of, the offense at all.

No overt act was necessary to constitute the offense of conspiracy at common law. (8 Cyc., 624, 669, 684.)

In Daniel O'Connell's case, Lord Campbell, speaking for the House of Lords, said:

> "A conspiracy to effect an unlawful purpose, or to effect a lawful purpose by unlawful means is by the common law of England an indictable offense; and it is fit that, if several persons deliberately plot mischief to an individual, or to the State, they should be liable to punishment, *although they may have done no act in execution of their scheme.* When they have actually done what they intended to do, it may be more proper to prosecute them for their illegal acts; but in point of law, they remain liable for the offense of entering into the conspiracy."
>
> *O'Connell vs. Rex.,* 11 Clark & Finn., 403.

And this Court has said that—

> "The offense (*of conspiracy*) does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone."
>
> *United States vs. Britton,* 108 U. S., 199, 204.

"At common law it was neither necessary to aver, nor to prove, an overt act in furtherance of a conspiracy." (*Bannon vs. United States,* 156 U. S., 468.

Both at common law and under the Federal Statutes, "the offense of conspiracy was complete whenever the unlawful concert or agreement was entered into and concluded, al-

though nothing was done pursuant thereto, or to carry it into effect."

*Dealey vs. United States,* 152 U. S., 539, 547;
*United States vs. Walsh,* 5 Dill., 447; S. C., Fed. Cases, No. 16,636.

It was said by Judge Dillon in *Walsh's case,* that

> "the offense of conspiracy at common law, being complete without an overt act, it is one of the few cases in which the law undertook to punish criminally an *unexecuted intent,* or purpose to commit crime."
> 28 Fed. Rep., 395.

This statement, however, is not accurate. The learned Judge failed to distinguish between the crime which the law punishes, and the ulterior crime which the conspirators committed the punishable crime, in order to accomplish. To illustrate: A and B desire to bring about C's death. They enter into a conspiracy to poison him. It will be observed that the main object or purpose is C's death—to commit a crime which the law calls murder; but that in order to effect it, they entertain another intent or purpose subordinate to the main purpose—the intent to form a combination in order to reach the murderous end in view. Pursuant to that subordinate intent they form the combination, that is, they enter into a conspiracy. Now, if we assume that at this juncture they are discovered, so that the affair proceeds no further, and no overt act has been done to effect the object of the conspiracy, both at common law and under the Federal Statutes, the *offense* of conspiracy is nevertheless complete. It is true they did not succeed in executing the object of the conspiracy, but it is equally true that they did succeed in forming the combination; that they did commit conspiracy.

The law does not assume to punish them for the intent to murder C, for if it did, the case would be one, as Judge Dillon remarks, in which the law undertakes to punish criminally for an unexecuted intent to commit crime. The law does not assume to punish that *intent*. It does not assume to punish any mere intent at all. It assumes to punish an act—the *act of conspiring* for the purpose of effectuating that wicked intent; and this *act of conspiring is* a substantive offense. It is a criminal *act* because of the criminal objective intent which breathed it into being. It is made a substantive offense because of the wicked or criminal nature of the object intended to be accomplished through the conspiracy. A few extracts from the decisions will make this plain.

Said the Supreme Court of Maryland:

> "There is nothing in the objection that to punish a conspiracy when the end is not accomplished, would be to punish a mere executed intention. It is not the bare intention that the law punishes, but the *act of conspiring* which is made a substantive offense by the nature of the object to be effected."
>
> 5 H. & J., 317; 9 Am. Dec., 534.

Said Benedict, J., in *United States vs. Donau* (25 Federal Cases No. 14,983):

> "The act to effect the object of the conspiracy which the statute calls for, is not designated an overt act, and was *not* intended to be made an element proper of the offense. The offense is the conspiracy. Some act by some one of the conspirators is required to show not the unlawful agreement but that the unlawful agreement while subsisting became *operative*. The offense of conspiracy is committed when to the intention to conspire is added the actual agreement; and

> this *intent* to conspire *coupled* with the *act of conspiring,* completes the offense intended to be created by the statute, notwithstanding the requirement that the prosecution must show by some act of some one of the conspirators that the agreement went into actual operation."

It will now be perceived that a substantive crime called conspiracy, is complete, that is, it is *committed,* when, to the intention to combine for the purpose of effecting an illegal object, there is added the actual agreement; the act of conspiring to accomplish it. These two, namely, the *intention* to combine for the criminal purpose, and the *act of conspiring* to accomplish it, are the elements, and the only elements, to be found in the crime of conspiracy, either at common law or under our Federal Statutes. Acts, commonly called "overt acts," done in pursuance of this conspiracy, or to effectuate it, are no part of the offense or crime itself.

The common law was entirely logical in declaring that the offense was a completed crime without an overt act.

Unless, then, the Federal Statute has given a new definition to "conspiracy;" unless it has made an "act" an element in, or substantial part of the crime itself, it follows that the crime is committed under that statute (as at common law) when and where the act of conspiring is committed; and, of course, this place must, under the Constitution, be the place of trial.

Our Federal Statute has made no such change. Section 5440 of the Revised Statutes provides that "if two or more persons conspire to commit an offense against the United States, and one or more of them do any act to effect the object of the conspiracy, all the parties are liable."

It must be admitted that there is confusion in the earlier

cases as to the meaning and effect of this statute. The judges at one time were inclined to hold that this section materially altered the common law, and made the act for which the statute calls, essential to a "complete offense;" (28 Fed. Cas., No. 16,636; 2 F. R., 757) that it made the act an ingredient of the crime, and an essential element of it.

*United States vs. Thompson,* 29 Fed. Rep., 86;
*United States vs. Nunnemacher,* 27 Fed. Cas., No. 15,902.

Indeed in *United States vs Hirsh* (100 U. S., 34) Mr. Justice Miller remarked that under Section 5440, some act is necessary "to complete" the offense. Subsequently the question was considered, and settled otherwise.

In *United States vs. Donau* (25 Fed. Cases No. 14,983) Benedict, J., said:

> "The offense of conspiracy is committed when to the intention to conspire is added the actual agreement; and this intent to conspire, coupled with the act of conspiring, completes the offense intended to be created by the statute, notwithstanding the requirement that the prosecution must show by some act of some one of the conspirators that the agreement went into actual operation. The requirement that some act to effect the object of the conspiracy be done by some one of the conspirators is intended to *afford* a *locus penitentiae.* Until some act be done by some one of the conspirators to effect the object of the unlawful agreement all parties to the agreement may withdraw and thus escape the effect of the statute."

In *United States vs. Britton* (108 U. S., 204) the Supreme Court said:

> "The offense charged in the counts of this indictment does not consist of both the conspiracy and the

acts done to effect the object of the conspiracy, but of the conspiracy alone.

"The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a *locus penitentiae,* so that before the act done either one of the parties may *abandon* their design and thus *avoid the penalty* prescribed by the statute."

In *Dealey vs. United States* (152 U. S., 539) the conspiracy had been committed in North Dakota, and the act to effectuate it, done in Canada. It was urged for the defendant that the indictment was defective in that it did -not charge that the overt act was done within the limits of the United States. The objection, however, was overruled. The Court in denying validity to it, quoted with approval the language of Mr. Justice Woods in *United States vs. Britton,* above set forth, and then added:

> "Hence, if the conspiracy was entered into within the limits of the United States *and the jurisdiction of the Court,* the crime was then *complete,* and the subsequent overt act in pursuance thereof, may have been done *anywhere.*"

In *Bannon vs. The United States* (156 U. S., 464, 469) the Court again quoted and approved the language of Mr. Justice Woods in *Britton's case* set out above, when he said that the provision in the statute as to an *act,* "merely affords a *locus penitentiae,* so that before the act done, either of the parties may abandon their design and thus *avoid the penalty* prescribed by the statute."

That language was repeated and again approved in *Hyde vs. Shine* (199 U. S., 76).

The agreement or combination is the offense, but under Section 5440 R. S. the doing of some act to effectuate it is

necessary to make it *indictable.* (*United States vs. Sacia,* 2 Fed. Rep., 757.)

It will now be perceived that a substantive crime called "conspiracy," is complete, that is, it is *committed,* when, to the intention to combine for the purpose of effecting an illegal object, there is added the actual agreement; the act of conspiring to accomplish it. These two, namely, the *intention* to combine for the criminal purpose, and the *act of conspiring* to accomplish it, are the elements, and the *only* elements, to be found in the crime of conspiracy, either at common law or under our Federal Statutes. Acts, commonly called overt acts, done in pursuance of this conspiracy, or to effectuate it, are no part of the offense or crime itself.

As will be observed, the "act" of the general conspiracy statute (§ 5440 R. S.) being no part of the crime, may be done *anywhere,* either in the United States or out of them. (*Dealy vs. United States,* 152 U. S., 539; *Hyde vs. Shine,* 199 U. S., 476); and the Sherman Act is not directed against *acts* in restraint of trade at all. It is leveled alone at *agreements.*

We therefore submit that this proposition has now been established, namely: An "act", commonly called an "overt act" is no part of, or ingredient in, the offense or crime called conspiracy under Federal law (or common law either, for that matter), and that crime is a complete one in itself, apart from all overt acts.

Inasmuch then as the "act" of the statute commonly called an overt act, is no part of, or element in, the crime of conspiracy, the place where such *act* may have been done cannot determine the question of jurisdiction; for the only Court that has jurisdiction, is the Court of the district in which the *conspiracy* was committed. It is the right of the accused

to have the trial there. Indeed, the trial cannot be had elsewhere, since the matter is not a statutory, but a Constitutional right. As already stated, the only ground upon which it has ever been contended that all the conspirators can be tried in any district in which any one of them may chance to commit an overt act, is that such act "renews" the conspiracy—that is, has the effect to make all the parties commit a new conspiracy in the jurisdiction where such *act* was done.

III.

*An overt act is not a renewal or continuance of the conspiracy which it was done to further. An overt act committed by one conspirator, gives no jurisdiction over the others, or himself either, for the crime of conspiracy. The conspirators can be indicted only in the district in which the crime itself was committed.*

The notion that a crime committed (that is completed) can be continued, for the purpose of the *venue,* is erroneous. When done, it is done; and it is a mere fiction to say that a thing done is continued, because the parties subsequently do something in pursuance of it. Continuance is not creation.

It may be that such overt *acts* are evil and *ought* to be made criminal, but they *have not been made conspiracies by Congress.* Many such acts are made criminal, and punished with severity—punished as distinct crimes. This has oftentimes presented the question of merger—the question whether the crime of conspiracy has been merged in the crime which the conspiracy was formed to commit, after it has been committed. The question of merger, however, does not arise here. The question here is this: Assuming for example that a conspiracy was formed in New York, criminal under the

Sherman Act, and that an overt act in furtherance of it was done in Tennessee, was such overt act, a repetition, or renewal, or continuance of the conspiracy, so as to give the Courts in Tennessee jurisdiction to indict, not for the overt *act,* but for the *conspiracy?*

If it be a repetition or renewal, then every overt act is a new conspiracy. That doctrine places the conspirators in such relation that every individual is not only the agent of his associates in evil *doing,* but an agent in *agreeing.* It clothes every conspirator with the power by the mere *doing* of some *act* in furtherance of the object of the conspiracy, thereby to engage his associates in numerous *new* criminal *agreements.* If the selling of fertilizer merchandise, shipping of goods, and writing ordinary business trade circulars and letters, are overt acts—as the indictment avers; and if it be also true that every overt act "continues" the original criminal agreement of conspiracy, in the sense that in every jurisdiction where an overt act is done by any one of the conspirators, all may be indicted *there* for conspiracy, it follows that these defendants have unconsciously and by *a mere presumption of law* committed thousands of crimes; that they have violated the Sherman Act as many times as they have sold merchandise, and made shipments, and sent out circulars.

It is unthinkable that a criminal *agreement* of conspiracy, can be repeated and duplicated by the mere *act of one* of the individuals engaging in the conspiracy, done in furtherance of the object of the agreed conspiracy. Courts may refine and *say* that the agreement is *continued,* but that does not *make* a new agreement. And if it be said that the agreement is "continued", nothing has been really said which puts the crime on a journey, for jurisdictional purposes. What is continued? The old agreement, and if the old one is con-

tinued a new one has not been made. And assume that it has been "continued", what then? It was *committed* when it began to be, not while it is continuing.

If an overt act by one continues or repeats the agreement as to all, so as to give jurisdiction in another district where the act was done, it must also be a renewal in the old original district as well. It follows that the fertilizer companies doing business in Tennessee, not only committed the crime of conspiracy when they engaged in the alleged agreement, but they have all committed new conspiracies every time one of them has shipped fertilizer, opened his mail, paid a laborer, or written a business letter.

The criminal statutes will receive no such construction as that, if they possibly admit of one less oppressive and more reasonable.

Again: Assume that the conspiracy was engaged in, in Tennessee as charged, and that these appellants sold goods, that is did overt acts, in Virginia, and that they were indicted in Virginia for conspiracy, as well as in Tennessee: Assume that they were first tried and convicted in Tennessee, could the plea of former conviction, or once in jeopardy, be interposed in Virginia? It could not if a new offense has been committed.

Every contract, combination, or agreement that operates to restrain trade is illegal. They are *forms* of agreements. It is the *agreement*—an agreement in one of these three forms, that is made illegal.

To prevent the making of such agreements, every person who makes any such contract, or engages in any such combination, or in any such conspiracy, is declared to be guilty of a misdemeanor.

Under the Constitution the person guilty of this misde-

meanor, must be tried in the district in which it was committed; and he cannot be indicted and tried anywhere else.

It is conceded on all sides that those who engage in, or form, a conspiracy in restraint of trade, (or any other kind of conspiracy) may be indicted in the district in which they formed, or engaged in it. But the contention of the Government is that they can also be indicted and tried somewhere else; that all of them can be indicted and tried in any other district in which some *one* of them may commit an "overt act" in furtherance of the object of the conspiracy. That is to say: If these 57 defendants formed or engaged in a conspiracy in restraint of trade in *New York*, and W. D. Rhea sold a ton of fertilizer at the trust price, in *Tennessee* (that is, did an "overt act" in Tennessee), all 57 defendants can be indicted and tried in the latter State. We ask, upon what principle? It is no answer, in a *Federal* Court, to say that it was allowable to do this at the common law, and that it has been held to be allowable in several of the States. There are no common-law crimes in the Federal Court, and State decisions are of no binding force in cases of this character. So the inquiry is, not merely whether cases are to be found which were so decided, but upon what principle were they decided? Is the principle such as to require a like decision here under a Constitution which requires accused persons to be tried in the district in which the offense was committed?

The reason given is that assigned in *People vs. Mather* (4 Wend., 229) which is, that

> "the law considers that where they act, *there* they *renew*, or perhaps, to speak more properly, they *continue* their agreement, and this agreement is renewed or continued as to *all* wherever any *one* of them does an act in furtherance of their common design."

The Court concedes that unless this be the reason "the decision can be accounted for on no other principle."

But does the law, or should the law, so consider?

Two ideas, quite distinct, are involved in this statement—the idea of *continuance*, and the idea of *renewal*. If an agreement of any kind (and therefore every conspiracy-agreement) be "renewed," the implication is that a new, or another, agreement has been made; whereas the notion that the parties "continue" the conspiracy, implies that the same old agreement has been continued or kept in existence.

The Sherman Act makes it unlawful to *make* any contract. It would seem that the offense is complete when the contract is *made*. That which may be done subsequently under the contract has never been regarded as a continuance of the contract; certainly not in such a sense as to transfer or multiply the criminal jurisdiction. The same is true with respect to combinations. In truth, the Sherman Act takes no thought of that which is actually done. Whether the result is reasonable or unreasonable, beneficial or injurious, is of no importance at all. Necessarily therefore the question of renewal or continuance does not arise.

So far as the Sherman Act is concerned the same is true with respect to conspiracies in restraint of trade.

Whether there be a contract or combination, or a conspiracy, there is a *status* or relation established by the agreement which, of course, it is expected will be continued. But that continuing *status* does not operate to make a series of new offenses, nor to put the original offense upon a journey through the districts in which one of the parties may chance to act while the status exists, so as to make as many new distinct crimes as there may be "overt acts."

To illustrate: A man being married, marrries a second

wife. He committed the offense of bigamy when the second marriage was entered into. The bigamous relation or status is continued (we will say) for five years. The man has not committed innumerable bigamies. He has not committed a new crime every day. He has continued the *status*, but that *status* is not the offense. The establishment of that *status*, the act of entering into the second marriage, constitutes the offense. As the status is not the offense, necessarily the removal of the bigamous pair into another district cannot give jurisdiction of the offense. And of course the statute of limitations begins to run from the time when he committed bigamy, and not from the last moment they lived together or kept up the status. (*Gise vs. Commw.*, 81 Penn. St., 428.)

So, here: the continuance of the status, that is the continuing to live up to the criminal agreement is not the offense, and can no more make a new criminal agreement, than does the continuance of the bigamous relation create and multiply the crime of bigamy. Continuance is continuance of that which is, and not the creation of something new.

Now with reference to the idea of "renewal;" a clearer idea is gotten, if we consider a conspiracy under the general conspiracy law, and for the moment leave the Sherman Act out of view.

Under the general law, an overt act is essential in order to *indict*. The crime of conspiracy is completely committed even though there never follows an overt act. But there can be no *indictment* for that crime, until there has been an overt act—because of the *locus penitentiae* policy. However, if there be an overt act, an indictment then lies, even though that act be done out of the United States. It is sufficient to

set the prosecuting machinery in motion if it be done *anywhere.*

Now assume that a conspiracy is entered into by 57 persons in *New York.* Then assume that one of them, A, does some act in furtherance of the object of that conspiracy—some overt act, in *Tennessee.*

According to the Government's contention, all the parties can be indicted in Tennessee for *conspiracy.* Either it is a new conspiracy in Tennessee, or it is not. If it is *not,* the accused must be indicted in New York, where they *created* the *status* and *formed* the conspiracy. If it *is* a new conspiracy, we then have a criminal agreement into which fifty-six persons have been plunged by the fifty-seventh, not only without their assent, but without their knowledge. When they meant to commit one crime, they are made also to commit another by operation of law, at a time and a place of which they are wholly ignorant. Again; if the overt act of A's, in Tennessee, created, a new crime and engaged all the parties in a new conspiracy, where is the overt act (essential to *prosecution*) of this new Tennessee conspiracy? Suppose A goes into Georgia and there commits another overt act, is it an overt act which has relation to the first (or New York) conspiracy, or is it an overt act of the second (or Tennessee) conspiracy, or is it a new Georgia conspiracy itself? Undeniably if the overt act committed in Tennessee formed a new conspiracy, this later overt act in Georgia must also form another new conspiracy; and so on *ad infinitum.*

If that be true, we have (1) a New York conspiracy: (2) An act in Tennessee which is both an "overt act" for the New York conspiracy, *and* a new Tennessee conspiracy in itself; (3) *and* finally an act in Georgia which is an overt act for

the Tennessee conspiracy, and a new Georgia conspiracy in itself.

Unless this be true, the Georgia act must be regarded as an overt act of the New York conspiracy—which leaves the Tennessee conspiracy without any overt act at all, and consequently non-indictable in the Federal Courts.

The absurd consequences of this view are now apparent. The Sherman Act declares every contract, and combination, and conspiracy, in restraint of trade or commerce, to be illegal. The first clause of section one contemplates the *agreement,* and denounces *it* as illegal. The next paragraph of the same section makes every person guilty of a crime, who *makes* any such contract, or *engages in* any such combination, or in any such conspiracy.

There can be no difference of opinion as to the "contract" of the statute. Every such contract is declared to be illegal, and every person who *makes* one is guilty of a crime. Undeniably the act of making the contract, the act of *assuming* and entering upon the contract status, is the crime. The existence at any given time, of the continued contract relation, is not the crime. The statute of limitations runs from the making of the contract, and not from the last day that it was recognized, or acted under, as being in force.

But the Government's insistence is, and indeed, for the exigencies of these cases must be, that a different rule is to be applied to combination-agreements and conspiracy-agreements from that which is applied to contract-agreements, although they are found in the same paragraph and sentence.

The contention is that the words "engage in" used with respect to combinations and conspiracies, do not relate alone to the making, or forming of, or to the creation or establishment of, the conspiracy, but to the status or relation which

is continued, *after* the conspiracy has been created or formed. The idea appears to be that if, for example, a conspiracy in restraint of trade was formed or brought about ten years ago, and was continued until the 26th day of May, 1906, (when this indictment was found) the parties to the conspiracy, inasmuch as it was *existent* on *that* date, *"engaged in"* it, *then,* instead of ten years before.

The statute of limitations is three years, and while the question as to when it began to run is not important in this case, it is one of importance in criminal law. It is not important in the present case, because the date on which the conspiracy which was formed or created, is within the three years before the finding of the indictment. But it is significant that some of the counts of the indictment charge that the defendants engaged in the conspiracy on the 8th day of July, 1903 (when it was formed) while others charge that they engaged in the conspiracy "during the period aforesaid," that is, between July 8, 1903, and May 26, 1906, when the indictment was formed.

There is, however, a question depending upon the interpretation of these words "engage in," of the greatest importance in the present case, to the Government. It is important to ascertain *when* the crime was committed, in order to determine *where* the offenders can be tried. For if the crime of "engaging in" the conspiracy was committed when and where the conspiracy was created or brought into being, or (if already existing) when and where any particular offender joined it, it is obvious that the offenders must be indicted *there.* In that view, it avails nothing for the Government to show that they continued to work under it, and that some of them did *acts* in Tennessee pursuant to it and to effect its object. While it can in such cases be said that they were

*engaged* in a conspiracy, in the sense that they were *working* under it, it cannot be said that they "engaged in" it in the sense of the statute—that is, it cannot be said that it was *then,* that they formed and established the criminal conspiracy-agreement.

Undeniably the offenders were guilty, if it be a fact that on the 8th day of July, 1903, in the city of New York they formed this alleged conspiracy. In the very hour of such plot they were guilty of the crime. And if, before the Secretary left the city of New York, he bought books for them, or deposited the money paid in by the members or prepared the application for the charter of the Colonial Development Co., they were *indictable.* They could have been indicted and convicted even though they had never done anything else.

The question now presented is whether this act of forming, or creating, or establishing, or joining, this conspiracy, or entering into the conspiracy-agreement, is the crime committed, and described by the words "engage in;" or whether these words mean a status, or contractual *relation.* If the words are to be taken in this latter sense, then whenever any offender is found working under a conspiracy-agreement, or living up to it in his business, or doing business according to it, he may be said to be "engaging in" a conspiracy in the statutory sense.

In which of these senses are the words "engage in" used in the Sherman Act?—is the question now to be determined.

Our view is that an offender "engaged in" a conspiracy, within the meaning of the Sherman Act, whenever and wherever he *embarks* or enlists in it, and that he is not "engaging in" it in the statutory sense whenever and wherever he *employs* himself in accordance with it.

In one view the offender commits the crime of conspiracy one time, somewhere; in the other view he is committing a *continuous* crime, everywhere in the eight States in which he assumes to do business, and in every locality in which he actually does business.

In this view the statute of limitations does not begin to run until he ceases to do business. In the other view it begins to run when the conspiracy-agreement was formed, or entered into.

It is obvious that the statute of limitations begins to run with reference to "contracts," when the contract is made; and it is equally obvious that the parties to these contracts will employ themselves as continuously under them, as do the parties to combinations and conspiracies employ themselves. The punishment for all these offenses is precisely the same, and it is imposed by one and the same statute.

There is no reason apparent why the words "engage in" should not receive the same construction that is given to the word "make." It is criminal to "make" a contract, or to "engage in" a combination or a conspiracy. It is merely a matter of style. We always speak of "making" a contract, but never of "making" a conspiracy. We speak of "forming" or "entering into" or "engaging in" a conspiracy. But the idea is the same in both cases. It is that of making, creating, forming.

The Sherman Act *could* have said that it should be a crime to make a contract in restraint of trade, *or* to do any act to carry the contract out, or to maintain it. The act *could* have said that it should be a crime to make a conspiracy in restraint of trade, *or* to do any act in furtherance of a conspiracy. It could have made it a crime to enlist in these undertakings, *or* to be employed in furthering them, after

they were brought about. But it has not done this. The act contemplates the agreement, and not that which is done pursuant to the agreement. The fact that these acts imply, or evidence the *continued existence* of the agreement, should it be so held, would not even then convert them into agreements, neither can it change the time and place at which the original agreements were made, or formed, or engaged in, or brought into existence.

## IV.

## THE "SHERMAN ACT," OR THE ANTI-TRUST ACT OF 1890.

The Sherman Act provides that—

> "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal.
>
> "Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished," etc.

The cases involving the construction of this act heretofore considered by this Court have been on the civil, not the criminal, side, and the result is that the words "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" have not yet been defined. It may possibly be contended that the words "contract," "combination" and "conspiracy" are used synonymously, and therefore that no peculiar meaning is to be attached to any one of them. Upon the other hand, it may be that they denote *different* things, and consequently define different

offenses. If they denote *different* things and define different offenses, it is obvious that an offender indicted for making a contract in restraint of trade, cannot be convicted by proof of a conspiracy in restraint of trade, and conversely, one indicted for engaging in a conspiracy in restraint of trade, cannot be convicted by proof that he made a contract in restraint of trade.

Mr. Justice Holmes understands these words to be used to define two classes of offenses, (1) contracts in restraint of trade, (2) and combinations or conspiracies in restraint of trade; for in his dissenting opinion in the *Northern Securities Case* he said that

> "the words hit two classes of cases, and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade, and we have to construe what these respectively are."

It will be observed that he regards the words "combinations" and "conspiracies" as synonymous.*

Our contention is, and this branch of the argument is intended to establish, that—

***Contracts in restraint of trade, conspiracies in restraint of trade, and combinations in restraint of trade, are not the same, but three separate and distinct, offenses under the Sherman Act.***

## *HISTORY OF THE ACT.*

On the 14th day of August, 1888, Senator Sherman introduced into the Fiftieth Congress, a bill to make illegal, all

* NOTE—It may be remarked that the indictment here particularly in the third and sixth counts, proceeds upon the idea that these two terms are *not* synonymous.

"arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition," etc. It was referred to a committee. This bill died with the Fiftieth Congress.

December 4, 1889, Senator Sherman introduced a new bill into the Fifty-first Congress, identical, so far as the language above quoted is concerned, with his original bill. It will be found that the word "conspiracy" did not appear in either of these bills; and an examination also reveals that the term "in restraint of trade" is not to be found in the *body* of any of them. The bill was referred to the Finance Committee, and reported back by it to the Senate, and again referred and reported back, prior to April 1890. It was referred again, for the third time.

April 2, 1890, Mr. Edmunds, the Chairman of the Finance Committee, reported, recommending that *all of the Sherman bill,* after the enacting clause, *be stricken* out, and the amendment which he submitted, be adopted in its stead. *This was done;* and that amendment is the act which is known as the "Sherman Act" today *.

It will be found that the original Sherman Act in its various forms, denounced "arrangements, contracts, agreements, trusts or combinations" as illegal. It did not include "conspiracy."

The bill after it left the Senate, was reported by Mr. Culberson of Texas, Chairman of the Judiciary Committee, to

* NOTE—The bill in its present form was drafted by Senator Hoar, who says that the only reason that he can think of why it is called the "Sherman Act" is the fact that Senator Sherman had nothing whatever to do with it. (Hoar's Autobiog., 70 Years, Vol. 2, p. 362.)

the House on the 1st day of May, 1890, at which time he said:

> "Now it will be observed, Mr. Speaker, that this is a very important principle embodied in the very outset of the bill, and may be stated in this way: Every contract made in restraint of trade between the States or among the States, or with foreign nations, and every combination in the form of a trust or otherwise, or every conspiracy in constraint of trade or commerce, among the several States, or with foreign nations, is denounced as illegal. Now just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill, will not be known until the courts have construed and interpreted this provision."
>
> 21 Cong. Rec., p. 4089.

While the bill was under consideration, upon Mr. Culberson's report, Mr. Wilson, of West Virginia, said:

> "Sir, its first section proposes to punish with heavy fines and imprisonment the making of certain contracts, combinations, and conspiracies, and the gentleman from Texas in charge of the bill, as able and clear-headed a lawyer as we have upon the floor, frankly informs the House that just what these 'contracts, combinations, and conspiracies' will be, cannot be known until the courts have considered and interpreted this section."
>
> 21 Cong. Rec., p. 4092.

That the Act creates three distinct offenses, and that the Congress so understood it, is further evidenced by its sixth section. It provides that any property owned *under* any *contract,* or *by* any *combination.* or *pursuant* to any *conspiracy,*

(and being the subject thereof) mentioned in section 1 of this act, and being in course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States and may be seized and condemned. As will be observed this section is so phrased as to carefully distinguish between properties owned by the parties to these different agreements. It is provided that property owned *under* a contract, or *by* a combination, or *pursuant to* a conspiracy, shall be forfeited and may be seized.

It therefore is clear that Congress understood three kinds or classes of agreements to be made criminal, although it was conceded that not until the courts had construed the act could it be definitely stated what particular species of agreements were comprised in the classes contemplated by the statute.

In 1893, one Patterson was indicted under this statute in Massachusetts. In the course of his opinion in that case, Putnam, J., said:

> "I think it is useful to analyze the statute. Separating it into parts we have—first, contracts in restraint of trade; second, combination in restraint of trade; and third, conspiracy in restraint of trade. There can be no question that the second and third parts as thus put, receive color from the first."

This case was argued by Mr. Root, now the Secretary of State, for the prosecution, and his brief is to be found in full in the report of the case. Among other things, Mr. Root said:

> "The statute enumerates three distinct facts—to-wit: (a) contracts in restraint of trade; (b) combinations in the form of trusts, or otherwise, in restraint of trade; (c) conspiracies in restraint of trade.

"Each one of these points to a *separate* and *distinct* class of cases in which, prior to the passage of the act, the courts of England and America had condemned acts injurious to the public interest because of their effect upon trade. In all three the principle of decision and the ground of condemnation, had been that they interferred with the public's right to have trade, and competition in trade, free and unrestricted.

"The first class of acts, (a) include the ordinary contracts which were declared to be void as against public policy, because some of the contracting parties thereby prevented *themselves* from pursuing their occupations, and the public was thus deprived of their contribution to the competition therein.

. . . . . .

"The second division of the statute, viz.: combinations in the form of trusts, or otherwise in restraint of trade, point to a class of cases which, while it may include the first cass, includes also a great number of combinations distinct from ordinary contracts in restraint of trade by a broad line of demarcation. These are combinations in which there is *no* contract which either by its express terms or by implication binds the contracting party *not* to exercise his trade, or not to compete freely with others, but which are declared by the courts in violation of public policy, because they accomplish the effect of preventing freedom of trade and competition. As a rule, the agreements and arrangements by which these combinations are formed are themselves, in their terms and requirements, of the most harmless and innocent character. It is the effect and the effect alone, upon the public interest which causes them to be declared against public policy.

"So long as the arrangements or agreements in regard to trade, made by a combination, produce the

injurious effect, no form of contract or device to produce that effect indirectly avails to escape the consequences.

"The third division of section 1—'conspiracies in restraint of trade'—refers to a class of cases in which the effect upon trade is produced, *not* by contract obligations binding the parties *not* to compete, *not* by pooling arrangements which make it against the party's interests not to compete, but by *preventing others* from carrying on trade.

"An essential element in these cases is that the prevention shall be, *not by means of competition itself* in the ordinary course of business—one competitor driving out another by fair competition—but that the prevention shall be by *unfair means,* which are *themselves* private injuries to the person whose trade is interfered with. Conspiracies to destroy or injury another's business by such means have always been actionable because of the private injury, and indictable because of the public injury, upon the same grounds and for the same reasons which have led the courts to declare contracts and combinations accomplishing the same effect void, as against public policy

. . . . . .

"It appears from the foregoing review that at the time the act now under consideration was passed, restraint of trade, as known to the law, was preventing any one from freely exercising his trade. That this prevention was held to be against public policy, because it deprived the public of the benefit of the prevented industry, and of its competition with others; that all *contracts* which had that effect were held to be void, because they produced that public injury; that all *combinations* which had that effect, directly or indirectly, were held to be unlawful because they produced that injury; that all *conspiracies to* produce that effect upon others by threats,

intimidation, fraud, and other *similar means,* were held to be criminal, because they produced that same public injury.

"Clearly *these* were the 'conspiracies' intended and aptly described in the language of the first section of the statute."

In *United States vs. Debs* (64 Fed. Rep., 724, 747) the Court, (Woods, C. J.) having this Sherman Act under consideration, said:

"But it is more significant than upon the introduction of the bill into the House the Chairman of the Judiciary Committee, as reported in the Congressional Record (Vol. 21, Part Five, p. 4089) made the following statement:

" 'Now, just what contracts, what combinations in the form of trusts, or whatever conspiracies will be in restraint of trade or commerce, mentioned in the bill, will not be known until the courts have construed and interpreted this provision.'

"It is therefore the privilege and duty of the Court, uncontrolled by considerations drawn from other sources, to find the meaning of the statute in the terms of its provisions interpreted by the settled rules of construction. That the original design to suppress trusts and monoplies created by a contract or combination in the forms of trust, which of course would be of a 'contractual character,' was adhered to, is clear; but it is equally clear that a further and more comprehensive purpose came to be entertained and was embodied in the final form of the enactment. Combinations are condemned, not only when they take the form of trusts, but in whatever form found, if they be in restraint of trade. That is the effect of the words 'or otherwise.' It may be that these words should be deemed to include only forms of like character—that

is to say, some form of contract as distinguished from tort; but if that be so, it only emphasizes and makes imperative the inference, which otherwise, it seems to me, would be sufficiently clear, that the word 'conspiracy should be interpreted *independently of the preceding words.* It is *hardly to be believed* that the words 'or otherwise' were used simply for the purpose of giving *fuller* scope to the antecedent words 'contract' and 'combination,' and *then* 'conspiracy' added, *merely* for the same purpose. Construed literally, the terms used in the body of this act forbid all contracts or combinations in restraint of trade or commerce; but that construction is controlled by the title which shows that only unlawful restraints were intended. But what constitutes unlawful restraint is not defined; and, under the familiar rule that such Federal enactments will be interpreted by the light of the common law, I have no doubt but that this statute, in so far as it is directed against contracts, or combinations in the form of trusts, or in any form of a 'contractual character' should be limited to contracts and combinations, such, in their general characteristics, as the courts have declared unlawful. But to put any such limitation upon the word 'conspiracy' is neither necessary, nor, as I think, permissible. To do so would deprive the word, as here used, of all significance. It is a word whose meaning is quite as well established in the law as the meaning of the phrase 'in restraint of trade' when used—as commonly, if not universally, that phrase has been used—in reference to contracts. A conspiracy, to be sure, consists in an agreement to do something; but *in the sense of the law,* and therefore in the sense of this statute, it must be an agreement between two or more to do, by concerted action, something *criminal* or *unlawful,* or it may be to do something lawful, *by criminal or unlawful*

means. A conspiracy therefore is *in itself* unlawful, and in so far as this statute is directed against conspiracies in restraint of trade among the several States, it is *not* necessary to look for the illegality of the offense in the *kind* of restraint proposed; and since it would be unnecessary, it would be *illogical* to conclude that *only* conspiracies which are founded upon, or intended to be accomplished by means of contracts or combinations in restraint of trade are within the purview of the act. It would be to make tautologous, words which have distinctly different meanings, and to deprive the statute, in a large measure, of its just and needful scope. Any proposed restraint of trade, though it be in itself innocent, *if* it is to be accomplished by *conspiracy,* is unlawful.

. . . . . .

"It would *not,* I suppose, be enough in an indictment to charge *conspiracy* in restraint of trade *in the langauge of the statute,* but it would be necessary, unless the proposed restraint be shown to be *in itself* unlawful, to allege the *illegal means* intended to be used in order to effect the restraint; and whether the means should be averred to have been used "in restraint of, or to 'restrain' trade, could hardly be important."

Mr. Justice Holmes, as already stated, expressed the opinion, while dissenting in the *Northern Securities Case* (193 U. S., p. 403) that the act denounced only two classes of offenses. That view he explained in the following language:

"The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade, and we have to construe what these respectively are.

Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although in some cases carrying on a similar one) which wholly or partially restrains the freedom of the *contractor* in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. Of course the objection did not apply to partnerships, or other forms, if there were any of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise, unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

"Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep *strangers* to the agreement *out* of business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm, and the supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm.

"All that is added to the first section by section 2 is that like penalties are imposed upon every *single* person who, *without combination,* monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce."

It does not appear to be contended by any one that the contracts, combinations, and conspiracies of the statute are one and the same, or that these words are merely synonymous terms. The controversy is as to whether the words "hit" two classes, or hit three classes of offenses.

We respectfully submit that the best-sustained view is that *three* classes of offenses are defined, or "hit" by this Act. If so, it is in order to inquire what they are; what are the contract, the combination, and the conspiracy hit by the Sherman Act?

The *contracts* denounced as unlawful by this act, are such agreements as have the effect to put some of the *parties* thereto *out* of business; to restrain such parties within a greater or less area, or for a greater or less time, from engaging in competition in business or trade.

The *combinations* denounced as unlawful, are such agreements as contemplate that the *parties* thereto shall *continue* in business, apparently in competition with each other, or with others, but *upon terms* which tend to restrict competition, or to fix and control prices.

The *conspiracies* denounced as unlawful, are such agreements as contemplate the suppression or diminution of competition on the part of others, or the control of prices, through the commission of some criminal or illegal act, *or* through some act not unlawful in itself by the use of criminal or illegal means. By "illegal," is not meant only those acts or methods which are positively criminal because in violation of some criminal law, but also those which are corrupt, dishonest, fraudulent, or immoral. (15 N. H., 396.)

To illustrate: An agreement between A, B, and C, manufacturers of, and dealers in, fertilizers, whereby B and C agree to shut down their factories and to retire from business

for a greater or less length of time, is an illegal "contract" within the meaning of the Sherman Act.

An agreement between A, B, and C, manufacturers of, and dealers in, fertilizers, to sell their products at a price *fixed by* a majority of them, or by a committee for them, is an illegal "combination," within the contemplation of the Sherman Act.

An agreement between A, B, and C, manufacturers of, and dealers in fertilizers, to bribe the agent of D, a rival in business, or to adulterate D's product, or to slander D's goods, or to break up his contracts with his customers, is an illegal "conspiracy" within the meaning of this act.

Necessarily certain elements or ingredients in all of these contracts, combinations, and conspiracies, in restraint of trade, are identical. There is an *agreeing together,* for the *purpose* of restraining competition, in all alike; but there are certain *other* elements (as appears from what has been already stated) which are present in some of these forms, but not in the others; and it is *these* elements or ingredients, that *determines* to which class of offenses any given offense must belong. The distinguished elements or characteristics are these: agreements which by consent withdraw or exclude one or more of the parties there to from competition in trade, without more, are "contracts;" agreements which continue the parties in business, but so bind them as to restrict competition as among themselves, or fix or control prices, are "combinations;" and agreements to restrict competition in trade, or control prices through the commission of some criminal or illegal act *upon another,* or the commission of some act lawful and innocent in itself, through illegal or criminal means, are "conspiracies."

The necessity for, as well as the signification of, the classification made by the act, is fully appreciated only when it is remembered that at common law contracts that were even in *unreasonable* restraint of trade, were *not* on that account unlawful in the sense of being criminal, or even giving rise to a civil action for damages. They were merely void.

The case of the *United States vs. Addyston Pipe & Steel Co.* (85 Fed. Rep., 279) decided by the Court of Appeals for the Sixth Circuit, was heard by Mr. Justice Harlan and Judges Lurton and Taft. Judge Taft speaking for the Court, said:

> "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void and not enforcible by the Courts."

Among the cases which enounce and establish this rule are the following:

*Mogul Steamship Co. vs. McGregor, Gow & Co.*, L. R. (1892) App. Cas., 25;
*Hornby vs. Close*, L. R. Q. B., 153;
*Hilton vs. Eckersley*, 6 El. & Bl., 47, 66;
*Aetna Life Ins. Co. vs. Kentucky*, 45 L. R. A., 355;
*Snow vs. Wheeler*, 113 Mass., 186;
*Commonwealth vs. Hunt*, 4 Metc., 134;
*Orr vs. Home Life Ins. Co.*, 12 La. Ann., 255;
*Macauley Bros. vs. Tierney*, 19 R. I., 255; S. C., 37 L. R. A., 455;
*Longshore, etc., Co. vs. Howell*, 26 Ore., 527; S. C., 28 L. R. A., 414;
2 Bishops Crim. Law, Sec. 233.

The Sherman Act was passed to give such contracts an unlawful or criminal character. In the *Addyston Pipe & Steel Co. Case,* the Court said:

> "The effect of the act of 1890 (*the Sherman Act*) is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public, against the execution of such contracts, and the maintenance of such trade restraints."
> 85 Fed. Rep., 279.

Undeniably modern cases are to be found which hold that at common law combinations in unreasonable restraint of trade were "conspiracies" because of the coercive power of numbers. These cases stand apart, and have been repudiated by the Federal Courts, as already shown by the *Addyston Pipe & Steel Company* case. This is shown also by the very able opinion of the Supreme Court of Kentucky in the case of the *Aetna Life Ins. Co. vs. The Commonwealth,* 45 L. R. A., 355.

The argument thus far has been directed to show, and we submit, has shown, that

(1). (a) Contracts in restraint of trade, (b) combinations in restraint of trade, and (c) conspiracies in restraint of trade, are separate and distinct classes of offenses—are different misdemeanors; and

(2). The distinctive, and distinguishing features of these offenses are these: a "contract" is an agreement which contemplates that one or more of the *parties* thereto, by mutual consent, shall be *retired* from competitive business; a "combination" is an agreement which contemplates that the *parties*

thereto shall *continue* in business, apparently competitive, but in reality not so—that they shall fix or control prices so as to have them uniform; and a "conspiracy" is an agreement which contemplates that the competition of *persons not parties* to the agreement, shall be crippled, or stifled by methods or means which are *unlawful.*

The indictment returned against the appellants does not charge that they made a contract in restraint of trade, neither does it charge them with having engaged in a combination in restraint of trade. The charge in every count is that they engaged in a conspiracy. As stated, four counts charge that they engaged in a conspiracy in restraint of trade in violation of the Sherman Act, and two counts charge that they conspired to engage in a combination in violation of Section 5440 R. S., the general conspiracy statute. These two counts are framed upon the assumption that a conspiracy is one thing, and a combination another. They charge that the defendants conspired to commit an offense—that is to engage in a combination in restraint of trade. If a conspiracy and a combination be the same thing, then these two counts [merely using a convenient phrasing] charge that the defendants *conspired to conspire.*

Let us now examine into the "conspiracy" of the Sherman Act.

It is to be remarked that this act is not nomenclatorial. It declares that every person who makes any contract, or engages in any combination, or conspiracy, in restraint of trade, shall be guilty of a "misdemeanor," but it does not give any name to that misdemeanor.

Engaging in a *conspiracy* in restraint of trade, is the particular misdemeanor of which the appellants stand accused. In endeavoring to ascertain what the conspiracy of this act

is it must be borne in mind that there are no common-law offenses against the United States. Be an act ever so bad, and deserving of punishment, unless there is a Federal Statute making it criminal, it cannot be punished in the Courts of the United States.

There are no common-law offenses against the United States.

*United States vs. Britton,* 108 U. S., 206;
*United States vs. Pettibone,* 148 U. S., 203;
*United States vs. Cruikshank,* 92 U. S., 564.

The common law has no force to make an act an offense which is not made one by an Act of Congress. (4 Fed. Rep., 204.)

Nevertheless when an offense is denounced by the Federal Statute without defining it, which offense is defined by and known to the common law, that law can be looked to in order to construe the statute and *define* its terms.

*United States vs. Coppersmith,* 4 Fed. Rep., 200;
*United States vs. Trans, Miss. Frt. Ass'n,* 58 Fed. Rep., 67;
*United States vs. Armstrong,* 2 Curt., 446;
*McCool vs. Smith,* 1 Black., 459, 469;
*Pettibone vs. United States,* 148 U. S., 203.

Although this is true, the Federal Courts have no *jurisdiction* over offenses unless they be given jurisdiction by the Constitution, laws, or treaties of the United States. (*Pettibone vs. United States,* 148 U. S., 203.)

> "Nothing is better settled," said Judge Hammond in *United States vs. Coppersmith,* 4 Fed. Rep., 204, "than that we cannot look to the State laws in the criminal jurisprudence of the United States for the characteristic elements which go to make up offenses

> and enter into it as a part of its legal status; nor to the common law; nor even to the character of the punishment. The Federal Courts take no cognizance of the State statutes in criminal proceedings and deduce no criminal jurisdiction from the common law, which has no force, directly or indirectly, to make an act an offense, not made so by Congress; though in all matters respecting accusation and trial of offense not otherwise provided for, we are referred to the laws and usages of the State where the judicial system was organized."

In *United States vs. Benson* (7 Fed. Rep., 591, 594) the Circuit Court of Appeals for the 9th Circuit said that—

> "The national Courts cannot resort to the common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress to define what are crimes, to fix their punishments, and to confer *jurisdiction* for their trial."

Such is the language of Judge Jackson in *In re Greene,* 52 Fed. Rep., 111.

The Sherman Act neither defines nor describes a conspiracy. It uses the word upon the assumption that it had a settled, established meaning. And so it had. Section 5440 of the Revised Statutes, which is the general conspiracy statute, passed by Congress in 1867, provides that persons who *conspire* to commit an offense against the United States shall be punished, but does not define what it is persons must do, in order to "conspire." However, we know that by "conspiracy" was meant that which was a conspiracy at the common law. A conspiracy was well defined at common law, and it is well established that when an offense is denounced by name by a

Federal Statute without defining it, and it is one which has a settled defined meaning at common law, that law can be looked to in order to construe the statute and define its terms.

*Pettibone vs. U. S.*, 148 U. S., 203;
*United States vs. Trans-Mississippi Ass'n*, 58 F. R., 67;
*United States vs. Armstrong*, 2 Curt., 446;
*McCool vs. Smith*, 1 Black, 459, 469.

At the time the Sherman Act was passed the meaning of the word "conspiracy" was established. It had the same meaning in Federal law that it had at common law. That is to say, a conspiracy is "a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, *or* some purpose not unlawful in itself, by criminal or unlawful *means.*"

*Pettibone vs. United States*, 148 U. S., 197, 203;
*United States vs. Addyston Pipe & Steel Co.*, 85 Fed. Rep., 818 (Taft, J.);
*Drake vs. Stewart*, 76 Fed. Rep., 142;
*United States vs. Debs*, 64 Fed., 724;
*United States vs. Benson*, 70 Fed., 594;
*Boutwell vs. Marr*, 43 L. R. A., 803; S. C., 76 Amer. State Rep., 746.

A conspiracy then, both at common law and under Federal law, is a combination of persons, by concerted action, to do something unlawful, *or* something in itself lawful, by unlawful means.

To make a *contract* in restraint of trade is criminal *only* because the Sherman Act says it shall be criminal. To engage in a *combination* in the form of a trust, or otherwise in restraint of trade, is criminal for the same reason, only—that is, because the Sherman Act says it shall be criminal.

To engage in a *conspiracy* to commit any "offense" was criminal under Section 5440 of the Revised Statutes, the general conspiracy law, long before the Sherman Act was passed. It is criminal also under the Sherman Act to engage in a particular kind of conspiracy, because the act provides that conspiracies in restraint of trade shall be criminal. As a consequence, *unless* the Sherman Act has superseded Section 5440 in so far as conspiracies which "hit" *trade and commerce* are concerned, such conspiracies are criminal for two reasons: They are criminal because the Sherman Act says they shall be criminal, and they are criminal also because Section 5440, the general conspiracy statute, says that *all* conspiracies shall be criminal. While there may be two reasons, yet, there is only one crime, for that Section 5440 is modified or *superseded* to the extent, and in the one particular, above mentioned, by the Sherman Act.

The *means* employed by a "combination" are not criminal or illegal under any law. The combination agreement itself is illegal, because the Sherman Act makes it illegal. But that act takes no notice whatever of the means used to effectuate the object of the combination.

The reason why a confederation is a "combination" and not a "conspiracy" is that it does not directly relate to strangers, and the means it employs are not illegal. It follows that the means to be employed are of the utmost importance. Illegal or criminal means will convert associations innocent in themselves into conspiracies.

As previously explained, agreements which tend to restrain trade through means which are innocent, and which contemplate that some of the parties thereto shall be retired from

business by consent, are "contracts"—the contracts denounced as illegal by the Sherman Act.

Agreements which restrain trade through means which are innocent, and which contemplate that the parties thereto shall remain in business controlled by a common understanding, are "combinations"—the combinations denounced by the Sherman Act.

But agreements which restrain trade through means that are criminal, or unlawful, *apart from the Sherman Act,* and which are directed against strangers to the agreement, are "conspiracies"—the conspiracies denounced by the Sherman Act.

In the latest edition of Greenleaf on Evidence (the 16th) a conspiracy is thus defined:

> "Without attempting to reconcile all the cases, a task nearly hopeless in the present undefined law of conspiracy, a general rule may be adduced from the current of well considered cases, that an indictable conspiracy must be a corrupt confederation to promote an evil in some degree *criminal,* or to effect some wrongful end by means of having some degree of *criminality.* Although in some cases it has been said that if the end is *unlawful,* concerted action to promote it is indictable; yet the word *"unlawful"* is to be taken in the sense of *criminal,* as it is unlawful to commit a trespass; still, no indictment will lie for a conspiracy to commit such a civil injury."
>
> Greenleaf on Evidence, Sec. 90*a* (16 Ed.).

Whenever these two elements are present in the agreement of confederation, namely: (1) a purpose against others, and the adoption of means that are illegal, the confederation is a conspiracy; and whenever that conspiracy directly tends to

affect trade, or stifle competition, it then assumes a form that is criminal under the Sherman Act.

The Sherman Act deals with "conspiracies" just like it deals with "contracts"—it makes *all* of them that are in restraint of trade, criminal. So far as the Sherman Act is concerned, a "conspiracy" to do something criminal in restraint of trade, and a conspiracy to do something not illegal in itself, by the use of criminal means, in order to restrain trade, are mere MEANS *to an end,* equally and alike.

A conspiracy, it matters not which kind it is, is a conspiracy: it is one of the agencies or methods employed to restrain trade, which are forbidden by the Sherman Act.

If it be true (and it is), that the element of criminality or *illegality* must be present, either as a means or an end, in a contract or agreement, in order to convert it into a conspiracy; if it be true that this *bad* element must be present in order to convict anybody under conspiracy law, of "conspiracy," it must also be true that in order to conviction (under the Sherman Act) of unlawful restraint of trade through the instrumentality of a *conspiracy,* it must appear that the persons accused have committed the offense of conspiracy—that they have engaged in a confederation marked and characterized by this *bad* element. In order to convict (of conspiracy) under the Sherman Act it must appear (1) that the accused have engaged in a "conspiracy," (2) and that that conspiracy tends to restrain trade. If these things are made to appear, the accused are guilty—guilty of committing a properly described, but unnamed, misdemeanor. They are guilty of violating the Sherman Act, *through means of a conspiracy.*

As will now be perceived, persons may be guilty of the crime of violating this Act by means of a "contract" which in itself, apart from the Sherman Act, is not criminal. They may be

guilty of the crime of violating this Act by means of a "combination" which in itself and apart from the Act, is not criminal. They may be guilty of violating this Act by means of a "conspiracy" which in itself and apart from the Sherman Act, is criminal. In this last mentioned instance we have a crime within a crime—a crime called "conspiracy," committed and employed as a *means* to commit another crime, an *unnamed* misdemeanor created by the Sherman Act.

The four counts based on the Sherman Act evidently proceed upon the assumption that inasmuch as the defendants are charged with violating that act by engaging in a conspiracy (not a contract, nor a combination) it was necessary for the indictment to be according to the forms used in conspiracy. Accordingly *overt acts* are set forth, and so also are the *means* employed to effect the object of the conspiracy.

The "overt act" is not a feature of the Sherman Act. It denounces certain *agreements,* and punishes those who enter into these agreements, without regard to acts in furtherance of them. Nor is it necessary for the indictment to contain averments as to overt acts when the Sherman Act is charged to have been violated through the form of a conspiracy, because the defendants in such case are not indicted for conspiracy, but for committing something else—the misdemeanor denounced by the Sherman Act. In case of conviction the punishment inflicted is not that prescribed by Section 5440 (the conspiracy statute), but is that prescribed by the Sherman Act, the Anti-trust statute.

It is necessary to aver in the indictment that an overt act has been committed, in all cases where the defendants are indicted under § 5440 for conspiracy, for the reason that this statute requires it, in order to *conviction;* but the Sherman Act makes no such requirement.

However, when it is charged that the Sherman Act has been violated by means of, and through a confederation in the form of, a "conspiracy," whatever is necessary to make out a conspiracy must be averred. It must be averred that the conspiracy was to do something unlawful, as, for example, to burn the fertilizer plant of a rival, or to secretly adulterate his goods, in order to cripple his competition, or that the conspiracy was one to do something (innocent enough in itself) by the use of such illegal means as made it criminal.

Not one of the four counts now under consideration charges that the defendants conspired to commit any crime, or to do any specific thing which was unlawful or criminal. Neither does any of them aver the employment of illegal or criminal *means* to attain an object apparently innocent in itself.

The *means* employed to restrain trade by the "conspirators" are set forth in detail, *but they are not illegal or criminal.*

The means alleged are these:

(1) They, the defendants, agreed upon uniform and non-competitive prices;

(2) They paid money into a common fund to be paid back to the conspirators upon an allotment based upon the quantity of goods sold;

(3) The terms upon which fertilizer merchandise should be sold to customers, were fixed and made uniform and non-competitive;

(4) They brought out a Canada corporation as an intermediary and common agent, to secure co-operative and faithful performance of the conspiracy agreement;

(5) They met together (the individuals did) to discuss and further the objects of the unlawful conspiracy; and

(6) They issued price lists in accordance with the agreement which they had made.

It will be observed that *not one of these things is criminal or unlawful.* Neither do they touch others, strangers to the agreement. As a consequence, no agreement to do any of these things, nor an agreement to use these means, can be a *conspiracy.* Why? Because in order for that to be a conspiracy, there must be an agreement to do something which is unlawful, *or* something innocent in itself by unlawful means. There is no Federal Statute, *apart from the Sherman Act,* which makes any of the ways and means set forth unlawful; nor are they unlawful at common law, even if it were allowable to look to that law. It follows that these counts of the indictment really charge no offense.

Numerous acts are set forth as "overt" acts. Not one of them is illegal or criminal. They are all acts such as writing checks, sending out price lists, making sales, and shipping merchandise, done in the usual course of business, and such only as the defendants would have done had the illegal conspiracy never existed.

It is obvious, from what can be gathered from the indictment, that the offense for which the defendants might possibly have been indicted is the crime of engaging in a *combination* in restraint of trade. But this has not been done. The charge, and the only charge, is that of engaging in a conspiracy. The agreement, and the means employed to further it, are all set out, but they do not amount to a charge of conspiracy: and a conspiracy must be charged, since a conspiracy *as a means* is an essential element in this one of the three crimes, denounced by Section 1 of the Serman Act.

## IV.

*The law of "overt act" has no place in the trial of affenses under the Sherman Act.*

Now as to the Sherman Act: Of course in so far as the law of "conspiracy" is concerned what has just been said with reference to the subject in general, applies with equal force to the Sherman Act, inasmuch as it does not even assume to change the law upon that subject.

Contracts, combinations and conspiracies "in restraint of trade" are unlawful; that is every agreement in the form of a contract, combination or conspiracy which directly tends to stifle competition in trade and commerce, is unlawful. (*United States vs. Joint Traffic Association,* 171 U. S., 577.)

It was well expressed by Grosscup, J., in *United States vs. Swift & Co.* (122 F. R., 534) when he said:

> "It is clear from them (meaning the decisions of the Supreme Court) that restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred; nor is it to be tested by the prices that result from the combination. Indeed, combination that tends directly to lower prices to the consumer, may, within the doctrine of these cases, even as against the consumer be restraint of trade; and combination that tends directly to higher prices, may as against the producer be restraint of trade. The statute, thus interpreted has no concern with prices, but *looks solely to competition,* and to the giving of competition full play by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting *competition* is, within the meaning of the Sherman Act, as now interpreted, restraint of trade."

And in *Whitwell vs. Continental Tobacco Co.* (125 F. R., 454, 457) the Circuit Court of Appeals said that

> "It has now been settled by repeated decisions of the Supreme Court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers, or consumers, but by the necessary effect which it has in defeating the purpose of the law. That purpose was to prevent the stifling or substantial restriction of competition, and the test of the legality of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the States. If its necessary effect is to stifle or to substantially restrict free competition, it is a contract, combination, or conspiracy in restraint of trade, and falls under the ban of the law."

The temporary and the permanent effects of an agreement touching trade or commerce may be so different, and the ultimate effect so difficult to determine, that it was deemed best by the Congress not to regard the prices which might actually immediatly follow as the result of trade combinations, nor the acts done pursuant to such combinations themselves. Accordingly the Sherman Act was leveled at *agreements*. It made every contract-agreement, every combination-agreement, and every conspiracy-agreement illegal, which directly tends to stifle *competition* in trade or commerce.

What the parties may *do* after the agreement has been entered into, and what *prices* actually prevailed thereafter, is immaterial. The sole inquiry is as to the *agreement*—as to whether *it* directly tended to restrain *competition* in trade or commerce.

The question is not what Congress could have done, or

what in our judgment it ought to have done, but what it did actually do.

Congress could have said that any *act* done pursuant to, or in furtherance of, one of these forbidden agreements should also be criminal, or unlawful. It could have said that it should be criminal to raise prices as the result of such combinations, and unlawful agreements. But Congress has said nothing of the kind. The Sherman Act is leveled at *agreements* alone. This being true it is going a great way to say by judicial construction, that acts done in furtherance of any such criminal agreement, shall be regarded as renewals and continuances of the agreements themselves, not only in order to multiply the offenses, but for purposes of the *venue* also—so as to enable an indictment to be brought anywhere that any one of the offenders may chance to do the act.

This Act may be violated, as we have seen, in three ways—through contracts, through combinations, and through conspiracies, which operate to restrain trade. With respect to "contracts," the Act is violated when the contract is made. The same is true with respect to "combinations." The Act is violated the moment they are made. No "overt act" was ever thought of, or contemplated, in connection with contracts or combinations. The offense is complete, and the guilty persons may be proceeded against, immediately.

But in conspiracy-law there has been introduced a doctrine known as the law of "overt act." As elsewhere shown, the crime of conspiracy however, is complete when it is entered into, both at common law and under the Federal Statute. The conspirators may be proceeded against at once, under the common law, even though no overt act has ever been committed. It is not thus, however, under our Federal

Statute. Although the agreement or combination is the offense, and although that offense is complete as soon as the agreement has been made, as a matter of public policy the hand of prosecution is stayed by the Federal Statute so as to give a *locus penitentiae*, until some act, commonly called an "overt act," has been done. Then, and not until then, can the *prosecuting* machinery be put in motion. It is a mere matter of governmental policy, just as is the policy to suspend the hand of prosecution after three years. The suspension of the prosecution until there has been an overt act, and the second suspension of prosecution after the statute of limitations has run, are both matters pertaining to the *prosecution*, not to the crime. The crime of conspiracy is complete when the agreement is made.

Although one accused of conspiracy cannot be *indicted* under the Federal Statute, *for conspiracy*, until some act has been done to effect the object of that conspiracy, it does not follow that he cannot be indicted under the Sherman Act for agreeing to restrain trade by means of a conspiracy, until some overt act shall have been done in pursuance of the conspiracy; since, if that were true, there would exist this singular condition: Persons making contract—agreements, or combination-agreements, may be proceeded against at once, while persons making conspiracy-agreements cannot be proceeded against, *until* some act to effect its object has been done; and if they be discovered before they have chanced to do such act, and then never act, it follows that they cannot be proceeded against at all. In this view, those guilty of perhaps the worst form of unlawful agreement in restraint of trade, would have an immunity either partial or total, according to circumstances, which none of the others possess.

Surely no such undesirable interpretation as this will be given to the Sherman Act.

This Act is leveled at all forms of agreements in restraint of trade. Conspiracy is a mere form of agreement—merely a *means* to an end within the contemplation of the Sherman Act. That Act does not punish for conspiracy, but for unlawfully restraining trade, through the instrumentality of a conspiracy. It recognizes conspiracy as a species of agreement, or unlawful means, through which trade may be restrained, and therefore it denounces every conspiracy-agreement, which operates to restrain trade—just as it denounces all contract-agreements and combination-agreements which do the same thing. Whenever the conspiracy is complete, the Sherman Act is infracted, even though no overt act ever be done. The Sherman Act offers no *locus penitentiae* to anybody, and authorizes a prosecution against everybody *at once*. It makes no inquiry to ascertain whether the offenders have committed an overt act, because it does not assume to punish conspirators for *conspiring*. It punishes misdemeanants for the offense of *restraining trade* through the medium of a conspiracy, and it stops only long enough to inquire whether a conspiracy which operates to restrain trade, has been formed. If so, the complete offense against the Sherman Act has been committed. If the conspiracy is not one which restrains trade, the Sherman Act leaves the Conspiracy Statute to deal with it. If it does restrain trade the Sherman Act does deal with it, not to punish for conspiracy, but to punish for the agreement which employs the conspiracy as a means to restrain trade.

The "overt act" is no part of the *offense* of conspiracy, even under conspiracy law. Then how can it be a part of the *offense* under the Sherman Act? If the Sherman Act gives

no *locus penitentiae* to contract agreements, nor to combination-agreements, how can it to conspiracy-agreements, since it deals alone with *agreements* which offend *it*? It does not deal with conspiracy as a crime, for the purpose of punishing *conspirators*, but it contemplates the conspiracy merely as a criminal *means* to the commission of another crime which it *does* punish—that misdemeanor which is committed by those who violate the Sherman Act.

The result is that the "act" of Section 5440, of the Revised Statutes—the "overt act" of Conspiracy Law, relating as it does to the procedure, and not being an element or part of the crime of conspiracy itself, is wholly irrelevant. It has no place, and is to be left altogether out of view, in cases arising under the Sherman Act.

That this is true is obvious from another point of view: Suppose that the statute of limitations in conspiracy to commit a crime (which is only a misdemeanor) is three years; and that the limitations upon prosecutions under the Sherman Act is five years; suppose further that *four* years after A made a contract in restraint of trade, and four years after B engaged in a combination in restraint of trade, and four years after C engaged in a conspiracy in restraint of trade, they are all indicted. Obviously A and B cannot successfully plead the statute. Can C, the most wicked offender of them all? If he be indicted under Section 5440, for conspiracy, he can plead the statute of three years; but inasmuch as he is charged with violating the Sherman Act, he cannot interpose that three-year statute. The fact that a conspiracy was the instrumentality, or *means* by which he was enabled to commit the offense of unlawfully restraining trade, cannot enable him to interpose the conspiracy-statute of limitations,

since the unlawful-restraint-of-trade statute, is the only one that applies.

It results that the offense of violating the Sherman Act is committed where the agreement is made, and not where an "overt act" may be done pursuant to the agreement. Or to speak precisely, unless the unlawful *agreement* in restraint of trade which the defendants have been indicted for making or engaging in, was made or entered into in the Middle District of Tennessee, the Courts of that District have no jurisdiction. It avails nothing to aver or to prove that overt acts to effect the object of the conspiracy were done in the district. The law of "overt act" has no place whatever in prosecutions under the Sherman Act. Overt acts are irrelevant. It is not necessary either to aver or to prove them.

If this view, viz.: that what is known as the overt act in conspiracy law, has no place whatever under the Sherman Act, the decisions beginning with *Brisac's Case* which hold that all conspirators can be indicted in any district where any one of them may do an overt act, are wholly irrelevant. Whether all may be indicted wherever any one does an act is an idle inquiry in cases where the statute knows no such thing as an overt act.

However, the question does arise whether one who "engages in" a conspiracy, *commits* the indictable crime when he embarks in it, or commits it when and while he employs himself in it: whether the crime consists in entering into or joining it, or whether it consists in *being* and *continuing* in it.

If we concede that one of many parties to an existing conspiracy-agreement, by continuing to employ himself in furtherance of its object, thereby "engages in" a conspiracy against trade—thereby commits the crime denounced by the

Sherman Act, it does not follow that he thereby engages his previously contracting associates.

When a conspiracy *exists,* the acts and declarations of one conspirator bind all, but the conspiracy itself can not be *established* as to the others, by what any one person says and does.

The interpretation which the Government puts upon the words "engage in" does this, and even more. According to the theory on which the indictment is framed, the "act" of one of the defendants who employed himself in pursuance of the conspiracy, *in Tennessee,* not only made *him* "engage in," or commit, the crime of restraining trade through a conspiracy, *there,* but had the effect to make all the others, absent and ignorant though they be, do the same thing. It is enough to make the actor "engage in" a crime through his act. It is too much to make him thereby "engage" all his associates.

## V.

*The third and sixth counts of the indictment charge that the defendants conspired to engage in a combination—that is, that they conspired to combine, or conspired to conspire. There is no such offense under the laws of the United States.*

The Government insists that there is no difference whatever between combinations and conspiracies under the Sherman Act. If that be true, it is obvious that the third and sixth counts use the word "combination" instead of conspiracy, as a mere matter of taste, and that what is meant is that the defendants conspired, in violation of Section 5440, to engage in a conspiracy in violation of the Sherman Act: that they

*conspired to conspire.* Thus stated, the fatal awkwardness of these counts becomes quite apparent.

In our view, however, this is immaterial, since upon the assumption that combinations and conspiracies are different and distinct, there is, as we think, no such offense as a conspiracy to combine, nor as a conspiracy to conspire. Why?

Under Section 5440 there was no such offense as a conspiracy to conspire, because this statute itself was the statute which created the offense of conspiracy under Federal law; and for the further reason that there cannot be *two* distinct bad purposes in a *conspiracy* to *combine.* One and the *same* bad purpose is the life of both equally and alike, and they are *so related through it* as to admit of no such sub-division.

A conspiracy is an agreement. So also is a combination. Agreements *per se* are not illegal. They become illegal only when they are made for a bad purpose.

When it is said that the defendants conspired to combine, or conspired to conspire, after all, no more is said than this; that they have agreed to *further* agree to restrain trade and commerce; to agree *to* agree to suppress, or restrict, the full play of competition in the fertilizer trade.

Prior to the Sherman Act, it was no offense against the laws of the United States to do this. No Federal statute forbade it. There was, however, a statute, Section 5440, which made it a criminal conspiracy to agree by concerted action to do anything which was in violation of the laws of the United States. The Sherman Act *followed* in 1890. It makes it unlawful to agree to restrain trade or commerce. *Now,* the making of such an *agreement* is an offense against the United States. As both statutes relate to criminal *agreements,* it follows that they are to be read and construed together.

The rule applicable to statutes *in pari materia* applies. Statutes or general laws made at different times and relating to the same subject, are to be construed together, *as if they were one statute and forming one system.*

Under this rule, Section 5440, *in so far as it relates to agreements* (or conspiracies) to commit an offense against the *Sherman Act,* must be regarded as having been *superseded* by that later act. An agreement to agree to restrain trade, or a conspiracy to conspire to restrain trade, or a conspiracy to combine to restrain trade, are but different forms of saying that the defendants *agreed to agree* to restrain trade.

It never was contemplated to punish for agreeing *to* agree to commit an offense against the United States. It is dealing sufficiently with the intent, to make agreements to *do* something, violative of some criminal law.

The Revised Statutes, Section 5440, punishes and prohibits all conspiracies to commit an offense against the United States. The later Act, the Act of July 2, 1890, punishes directly conspiracies to perform certain acts. This Act is in substitution of the previous Act so far as those specific offenses are concerned. Under the last Act the offenses prohibited are not conspiracies followed by a direct overt act as are aimed against in Section 5440, but under the words of the Statute the conspiracy is in itself the act prohibited.

To hold otherwise would mean that a man could be tried and convicted twice for an offense against the Act of 1890: viz.: first for the conspiracy itself prohibited by that act, and second, under Section 5440 for the conspiracy to commit an offense by forming the conspiracy prohibited by the Act of 1890.

This has been so decided in the case of *United States vs. Guilford, et al.* (146 Fed. Rep., p. 298).

There the court held that when the conspiracy is the substantive offense, the indictment must charge the distinct conspiracy itself, and an indictment charging a conspiracy to form the conspiracy under Section 5440 is inadmissible.

This case follows the decisions to the same effect in *Chadwick vs. U. S.* (141 Fed. Rep., p. 225), and *U. S. vs. Dietrich* (126 Fed. Rep., p. 664), and is in affirmance of the principle laid down by Chief Justice Cockburn in *Regina vs. Boulton* (12 Cox's Criminal Cases, p. 93).

If the principle announced by these cases be correct (and we see no answer to the reasoning of the learned judges who delivered them), there can be no doubt that under the present indictment the two counts under Section 5440 of the United States Revised Statutes disappear, and we are left with the four counts which were brought under the Act of July 2, 1890, prohibiting combinations and conspiracies in restraint of commerce.

The offenses at which the Sherman Act is leveled, and which it denounces, are agreements in the nature of conspiracies. That Act punishes every offense against *trade and commerce,* which Section 5440 could possibly punish, and more. The construction we insist upon permits no one who commits any offense against trade and commerce, in the nature of a *criminal agreement,* to escape. It makes the system harmonious. Upon the other hand, the notion that *now* there is such an offense as a conspiracy *to conspire* in restraint of trade, or a conspiracy to combine in restraint of trade, or an agreement *to* agree in restraint of trade, is too far-fetched, and attenuated for a system of criminal law.

Furthermore, it is to be remarked that the punishment inflicted by Section 5440 upon those guilty of conspiring to

commit an offense, is much more severe than the punishment inflicted by the Sherman Act for committing the offense itself. No system of laws should be construed to make the punishment for conspiring to commit a given offense greater than for the offense itself, if such construction can possibly be avoided. (See *U. S. vs. N. Y. Cent. & H. R. R. Co.,* 146 Fed. Rep., 298.)

It was not intended by Congress, that an indictment would lie under Section 5440 of the Revised Statutes for conspiracy to violate the provisions of the Sherman Act.

It would be an anomalous and strained construction to so hold. And yet this is the logic and inevitable consequence and result of the position of the Government.

Every conspiracy to restrain interstate trade and commerce, must necessarily fall under the Sherman Act, for that is the statute which made restraint of interstate trade and commerce unlawful and punishable. Before the enactment of that law, contracts, combinations, and conspiracies in restrain of interstate trade and commerce were not unlawful. They could be formed and entered into with impunity so far as the Federal Government was concerned. Their illegality, and the penalty for engaging in them, were declared by the Sherman Act.

That Act named and embraced three means or methods of restraining trade and commerce, each different and distinct from the other, and conspiracy was one of them. If it be possible to restrain trade and commerce in any other manner, or by other means than those three named in and denounced by the Act, such restraint of trade and commerce, thus accomplished, will not be a crime, and cannot be punished.

If this view be correct, it follows that there is no such

offense as that charged in the third and sixth counts, because from the nature of the offense, when the two statutes are read together, Section 5440 is *superseded* by the Sherman Act, *in so far* as agreements or conspiracies *in restraint of trade* are concerned.

## VI.

*The appeals in these cases were properly taken to this Court instead of to the Court of Appeals. Cases involving the question of personal freedom, or a constitutional question are appealable directly to the Supreme Court.*

The rule is that the Supreme Court may review an order of a Circuit or District Court upon an application for a writ of *habeas-corpus* when a constitutional or jurisdictional question, or a question involving the construction of a treaty is involved.

*Ekiu vs. United States,* 142 U. S., 651;
*Horner vs. United States,* 143 U. S., 570.

In the case of *Ex parte James Lemon* (150 U. S., 393), the Chief Justice said:

> "By the fourth section of the judiciary Act of March 3, 1891, it was provided that 'a review by appeal, by writ of error or otherwise, from the existing Circuit Courts shall be had only to the Supreme Court of the United States, or in the Circuit Court of Appeals hereby established, according to the provisions of this Act regulating the same. Section five defined the cases in which appeals or writs of error might be taken from the Circuit Courts directly to this Court; by the sixth section the Circuit Court of Appeals were vested with appellate jurisdiction to review final decisions in the Circuit Courts in all cases other than

> those provided for in the preceding section of this Act unless otherwise provided by law.' . . . While the right of appeal from the judgments of Circuit Courts on *habeas-corpus* directly to this Court in all cases, is taken away by the Act of March 3, 1891, that right still exists in the cases designated in Section 5 of that Act, and upon such appeals that amendment may operate."

By Section 5 of the Act it is provided:

> "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court . . . in any case involving the construction or *application* of the Constitution of the United States."

In *Ekiu vs. United States* (142 U. S., 651), it was said, referring to the Act of March 3, 1891:

> "As this case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this Court, notwithstanding the appeal was taken since the Act establishing Circuit Courts of Appeal took effect."

This was a case of *habeas-corpus* sued out in the Circuit Court of the United States by a female subject of the Emperor of Japan restrained of her liberty and detained at San Francisco upon the ground that she should not be permitted to land in the United States. The inspector of immigration intervened in opposition to the writ of *habeas-corpus,* stating that the petitioner was an alien immigrant from Yokohama, Empire of Japan, and a person without means of support, without relatives or friends in the United States, and a person unable to care for herself, and liable to become a public charge, and,

therefore, inhibited from landing, under the provisions of the Act of March 3, 1891, and previous acts of which it was amendatory.

At the hearing before the Commissioner of the Circuit Court, the petitioner offered to introduce evidence as to her right to land; and contended that the Act of 1891, if construed as vesting in the officers named therein exclusive authority to determine that right, was in so far unconstitutional, as depriving her of her liberty without due process of law; and that by the Constitution she had a right to the writ of *habeas-corpus* which carried with it the right to a determination by the Court as to the legality of her detention, and, therefore, necessarily, the right to inquire into the facts relating thereto.

The Circuit Court dismissed the writ of *habeas-corpus* and remanded the petitioner to the custody of the Marshal, and she appealed directly to the Supreme Court. The appeal was entertained, the Court saying:

> "As this case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this Court."

The case of *Horner vs. United States* (143 U. S., 570 (No. 2)) was an appeal from an order of the Circuit Court of the United States dismissing a writ of *habeas-corpus* brought by Horner who was arrested and committed by a Commissioner on the charge of having unlawfully deposited in the post-office in New York a circular concerning a lottery, addressed to a person in Chicago. The complaint was founded on the statutes of the United States prohibiting the sending of letters, postal cards or circulars concerning any lottery or gift enterprise through the mails of the United States; and

providing for his indictment, trial and punishment either in the district at which the unlawful publication was mailed or to which it was carried by mail for delivery.

One of the grounds on which the appellant sought reversal of the judgment of the Circuit Court dismissing the *habeas-corpus* was that the Act was unconstitutional. It was held that on that ground the appeal direct to the Supreme Court was authorized and proper.

In the case of *Horner vs. United States* (143 U. S., 207 (No. 1)) the Supreme Court entertained without question an appeal from the judgment of the Circuit Court dismissing a writ of *habeas-corpus* and sued out by a person who had been arrested in the Southern District of New York on an indictment found in the Southern District of Illinois against him for using the mails of the United States for the transmission from New York to Chicago of circulars concerning lotteries. The District Judge of the Southern District of New York issued a warrant for removal to Illinois, and Horner was committed to the custody of the United States Marshal for that purpose. He, thereupon, sued out a writ of *habeas-corpus,* in the Circuit Court of the United States, which the Court dismissed, from which judgment he prayed an appeal to the Supreme Court of the United States.

Among the assignments of error in the Supreme Court, there were several, which alleged, that the warrant of removal if executed, would deprive the appellant of the right secured to him by Article 3, Section 2 of the Constitution of the United States and the Sixth Amendment to the said Constitution, to be tried in the State and district wherein the crime was committed.

It will be observed that the appeal in the *Horner case* was predicated upon precisely the same ground that the appeals

in the present cases are based, to wit, the deprivation of the right of the accused to trial in the State and district in which the alleged offense was committed.

Both in the petitions for the writ of *habeas-corpus* and in the Assignments of Error, it is alleged that the offenses charged in the indictment were not committed in the Middle District of Tennessee, and that the warrants of removal if executed, would deprive them of the right of trial in the State and district in which the crime was committed, secured to them, by Article 3, Section 2, of the Constitution and the Sixth Amendment to the Constitution.

It is also alleged in the Assignments of Error in these cases that the appellants were deprived of their liberty without due process of law in violation of the Fifth Amendment to the Constitution; and that they were arrested and ordered removed in violation of the Fourth Amendment of the Constitution.

It is sufficient that the right to be discharged from detention on the writ of *habeas-corpus* is based upon some provision of the Constitution; that it is claimed that the prisoner is denied rights secured by that instrument. Whether the claim or contention is well founded or not is another question, which this Court, after hearing the case must determine. Having invoked the protection of the Constitution, the prisoner is entitled to be *heard* by this Court on appeal.

The right of appeal to this Court in cases similar to this, has not been questioned.

*Beavers vs. Henkel,* 194 U. S., 73;
*United States vs. Greene,* 183 U. S., 241;
*Hyde vs. Shine,* 199 U. S., 62;
*Greene vs. Henkel,* 183 U. S., 249;
*Benson vs. Henkel,* 198 U. S., 1.

There is *"no jurisdiction* to commit, nor any to order the removal of the prisoner"—

(*a*) When the indictment charges no offense against the laws of the United States; or

(*b*) When the evidence given fails to show any offense; or

(*c*) When the offense charged was not committed, or triable in the district to which the removal is sought.

This Court has said in *Greene vs. Henkel* (183 U. S., 249, 261) that in such cases there is *no jurisdiction* either to commit or to order a removal of the "offender".

The prisoner who is detained in custody under such circumstances is deprived of his liberty without due process of law. To hold a man in custody under an indictment which charges no offense, or for trial in a district in which the alleged offense was not committed or triable, or with a flat refusal to permit him to introduce evidence to show the absence of probable cause is to deprive him of his liberty without due process of law. Such imprisonment violates Article 3, Section 2, of the Constitution, and the Fifth and Sixth Amendments.

Jurisdictional questions can always be inquired into on *habeas-corpus.*

*In re Neilson,* 131 U. S., 176;
*In re Coy,* 127 U. S., 731;
*In re Snow,* 120 U. S., 274;
*In re Sawyer,* 124 U. S., 200;
*Ex parte Bain,* 121 U. S., 1;
*Ohio vs. Thomas,* 173 U. S., 276.

The jurisdictional question in this case is a constitutional one, for the rights attempted to be asserted by the appellants, are secured by the Constitution of the United States.

Cases involving the question of personal freedom, and the questions arising under the Constitution, are appealable to the Supreme Court directly and not to the Court of Appeals. (*Simmons vs. Simmons,* 175 U. S., 166.)

---

## RESUME.

1. It is the *right* of the "offender" in removal proceedings, when a certified copy of the indictment is the only evidence offered against him, to present evidence to show the absence of probable cause. That is to say: *to show by evidence* that he did not commit the offense charged, or if he did, that it was not committed in the district in which the indictment was found.

2. If, upon looking into the case, it appears that the Court in which it was found had no jurisdiction, or that it charges no offense against the laws of the United States, the order for removal should not be made.

3. The indictment in the present case charges no offense.

None is charged by the third and sixth counts, because there is no such offense as a conspiracy to engage in a combination in restraint of trade; no such offense as a conspiracy to combine, or a conspiracy to conspire.

None is charged by the first, second, fourth, and fifth counts, because they charge a conspiracy; charge that the appellants engaged in a *conspiracy* in restraint of trade. They do not aver that appellants conspired to do something criminal whereby trade would be restrained, but that they

conspired to *directly* restrain trade by and through certain specified and alleged means. These means are *not* illegal or criminal, and therefore no conspiracy was committed, nor is one charged.

4. The law of "overt act" has no place under the Sherman Act. It is irrelevant. No overt act need be either alleged or proved in prosecutions under this act.

5. The act, or overt act, is no part of the offense of conspiracy itself.

The offense, even under general conspiracy law (Section 5440), is complete without it. Nevertheless the offender cannot be *indicted* until an overt act is done. The provision of the statute as to acts was designed to give *a locus penitentiae,* and affects the prosecution alone. It does not relate to the crime.

6. Under the Constitution of the United States, persons indicted for violating the Sherman Act, and Section 5440 of the Revised Statutes, can be tried only in the district in which the crime was committed. They cannot be indicted and tried in another district, upon the ground that some of their co-conspirators committed overt acts therein. A conspirator cannot be indicted in a district in which he committed an overt act, neither can he be indicted in a district in which a co-conspirator committed an overt act, unless he engaged in the *conspiracy itself* therein.

7. There is no such offense as conspiracy under the Sherman Act. There is such an offense as restraint of trade through conspiracy as a means—of engaging in a "conspiracy in restraint of trade or commerce". However complete and finished the conspiracy, unless it is in *restraint of trade,* it does not violate the Sherman Act. Neither does it violate

Section 5440 of the Revised Statutes, if it be in restraint of trade. In such case it is in violation of the Sherman Act alone.

HENRY A. M. SMITH,
JOHN S. MILLER,
JOHN J. VERTREES,
JAMES C. BRADFORD,
*Attorneys for Appellants.*

# APPENDIX.

CONSTITUTION, ARTICLE III, SECTION 2.

The trial of all crimes, except in cases of impeachments, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

VI. AMENDMENT TO CONSTITUTION.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

SECTION 1014, REV. STAT. (REMOVAL STATUTE).

For any crime or offense against the United States, the offender may, by any Justice or Judge of the United States, or by any Commissioner of a Circuit Court to take bail, or by any Chancellor, Judge of a Supreme or Superior Court, Chief or First Judge of a Common Pleas, Mayor of a city, Justice

of the Peace, or other Magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such Court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such Court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the Judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the Marshal to execute, a warrant for his removal to the district where the trial is to be had. (*Acts* 1789, *ch.* 20; 1793, *ch.* 22; 1842, *ch.* 188.)

28. Stat. L., 416. (Act 1894, Ch. 301.)

*Provided,* That it shall be the duty of the Marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest Circuit Court Commissioner, or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof. . . . . (2 *Fed. Stat. Anno.,* 334.)

SEC. 5440, R. S. (THE GENERAL CONSPIRACY STATUTE.)

If two or more persons conspire either to commit any offense against the United States, in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the Court.

ANTI-TRUST ACT OF 1890. (THE SHERMAN ACT.)

Section 1. Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.

Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

Sec. 2. Every person who shall monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

. . . . . .

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the

subject thereof) mentioned in Section 1 of this Act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.